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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

Case Number: SC14-755

v.

DEAN ALDEN SHELLEY

Respondent.

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF

VICTORIA HATFIELD
Florida Bar No. 84248
O'Brien Hatfield, PA
511 West Bay Street, Suite 330
Tampa, Florida 33602
veh@markjobrien.com

ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

The Respondent accepts Petitioner's statement of the case for this appeal, with the following additions / corrections:

In reversing in part, The Second District Court of Appeal in *Shelley v. State*, 134 So.3d 1138, 1140 (Fla. 2d. 2014), first found that there is no explicit statement of intent to authorize multiple punishments for conduct that violates both sections 847.0135(3)(b), and 847.0135(4)(b), Florida Statutes. The Second District therefore certified conflict with the First District's decision in *State* v. *Murphy*, 124 So.3d 323 (Fla. 1st DCA 2013) only "to the extent that it holds that the legislature explicitly stated its intent to allow separate convictions for soliciting and traveling for purposes of a double jeopardy analysis". *Shelley*, 134 So.3d at 1142.

STATEMENT OF THE FACTS

The Respondent accepts Petitioner's statement of the facts for this appeal.

SUMMARY OF THE ARGUMENT

To resolve the certified conflict, this Court must determine whether the Legislature explicitly stated its intent to allow separate convictions for soliciting pursuant to section 847.0135(3)(b), Florida Statutes and traveling pursuant to section 847.0135(4)(b), Florida Statutes for purposes of a double jeopardy analysis. This Court should adopt the rationale of the Second District in *Shelley*, which held that there is no explicit statement of intent to authorize multiple punishments for

conduct that violates both section 847.0135(3)(b) and section 847.0135(4)(b). The First District, on the other hand, held that because the Legislature expressly intended to punish both acts, dual convictions for soliciting and traveling do not violate the prohibition against double jeopardy. *State v. Murphy*, 124 So. 3d 323, 330 (Fla. 1st DCA 2013).

There is no explicit statement of legislative intent to punish separately the offenses of soliciting and traveling arising from the same criminal transaction. Contrary to the State's assertion, the fact that the Legislature separately and distinctly defined the offenses soliciting and traveling within section 847.0135 does not constitute an explicit statement of intent for purposes of a double jeopardy analysis. Also contrary to the State's assertion, the plain language contained within sections 847.0135(3)(b) and 847.0135(8) does not constitute an explicit statement of intent for purposes of a double jeopardy analysis on this issue. Being no explicit statement of intent, the *Blockburger*[1] analysis under section 775.021(4), Florida Statutes controls. The State does not dispute that the soliciting offense is subsumed by the traveling offense. Thus, dual convictions for soliciting and traveling violate the prohibition against double jeopardy.

If this Court finds that the Legislature explicitly stated its intent to allow separate convictions for soliciting and traveling within section 847.0135 when

[1] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

committed in the same criminal episode, this Court should further find that *Shelley* was decided correctly without further analysis. Nevertheless, it is submitted that the State incorrectly asserts that despite the Legislature's intent, convictions for both offenses are proper in the instant case because the Respondent used the computer four times on the date in question prior to completing the act of traveling. The State's assertion is without merit because, despite the Respondent's multiple uses of the computer on September 19, 2011, the State did not charge the offenses in this case as occurring during separate criminal episodes; rather, it charged them as occurring during a single criminal episode.

Further, electronic contact alone is not sufficient to constitute separate offenses under section 847.0135(3)(b). Specifically, although the Respondent electronically contacted "Hawkins" multiple times on September 19, 2011 prior to traveling, said contact did not constitute an "offense" pursuant to under Section 847.0135(3)(b), Florida Statutes, and thus said contact does not support multiple violations of the statute.

ARGUMENT

POINT ONE

CONVICTIONS FOR BOTH SOLICITING AND TRAVELING ARISING FROM THE SAME CRIMINAL TRANSACTION VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

This is a question of law, which is reviewed de novo. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344 (1994); *State v. Glatzmayer*, 789 So.2d 297, 301-02 n.7 (Fla. 2001).

There is no explicit statement of legislative intent to punish separately the offenses of soliciting and traveling arising from the same criminal transaction. The State lists the following in support of its assertion that the Legislature expressly intended to punish both acts: (1) both offenses are defined as separate and distinct crimes; (2) the Legislature has expressly stated that each separate use of a computer to solicit a parent or guardian or someone believed to be a parent or guardian of a child may be charged as a separate offense; and (3) the Legislature has even more broadly stated that prosecution of an accused for one offense under section 847.0135 does not preclude prosecution of that person for a violation of any other law of this state, which is a clear expression of legislative intent to authorize separate punishments for the separate statutory violations.

Contrary to the State's assertion, the fact that the Legislature separately and distinctly defined the offenses soliciting and traveling within section 847.0135

does not constitute an explicit statement of intent for purposes of a double jeopardy analysis.

Article 1, section 9, of the Florida Constitution provides in pertinent part: "No person shall ... be twice put in jeopardy for the same offense." Similarly, the Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." The constitutional protection found in the United States Constitution and the Florida Constitution do not prohibit multiple punishments for different offenses arising out of the same criminal transaction as long as the Legislature intended to provide separate punishments. *Valdes v. State*, 3 So.3d 1067, 1069 (Fla. 2009). "As the United States Supreme Court explained in *Brown v. Ohio,* 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the double jeopardy clause to define crimes and to fix punishments. Where multiple punishments are imposed at a single trial, 'the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.'" *Bishop v. State*, 46 So. 3d 75, 80 (Fla. 5th DCA 2010).

To determine whether the Florida Legislature intended to authorize separate punishments for *different offenses* arising out of the same criminal transaction,

courts first look to the statutes defining the crimes to see if there are any specific, clear and precise statements of legislative intent. *Valdes*, 3 So.3d at 1071 (*emphasis added*). Absent a clear statement of legislative intent in the criminal offense statutes themselves, courts employ the *Blockburger* test, codified in section 775.021(4), Florida Statutes, to determine whether separate offenses exist. *Id.* at 1070–72.

In the context of resolving double jeopardy issues, the fact that separate and distinct offenses arise from the same criminal transaction does nothing more than trigger the necessary analysis of whether the Florida Legislature intended to authorize separate punishments for each separate offense. Separate and distinct offenses arising from the same criminal transaction *triggers*, rather than *completes*, the necessary inquiry of legislative intent.

Further, the Legislative's action of defining separate offenses does not constitute an *explicit* statement. Examples of explicit statements of legislative intent are as follows: "Each separate use of a computer online service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission wherein an offense described in this section is committed may be charged as a separate offense." Section 847.0135(3)(b), Florida Statutes; "The provisions of this section are supplemental to all other provisions of law relating to the possession, use, or exhibition of a firearm." Section 790.22(7),

Florida Statutes. Clearly, there is an explicit statement of the legislature's intent to authorize multiple punishments for each violation of section 847.0135(3)(b); however, there is no explicit statement of intent to authorize multiple punishments for conduct that violates both section 847.0135(3)(b) and section 847.0135(4)(b).

Lastly, creating the bright line rule of law, which is what the State is suggesting this Court do, that separately defined offenses constitute explicit legislative intent to authorize separate punishments would effectively abrogate section 775.021(4)(b), Florida Statutes. Section 775.021(4)(b) is the legislatively prescribed means of determining legislative intent to authorize multiple punishments for separate criminal offenses arising out of the same criminal transaction. Specifically, the double jeopardy analysis always addresses the potential for convictions for *separate and distinct crimes*. Thus, under the State's theory, courts will never get to consider the effect of section 775.021(4)(b) because the fact that the crimes are defined separately reflect the "clear legislative intent" to authorize multiple punishments. Said reasoning effectively nullifies the operation of section 775.021(4)(b), Florida Statutes.

Also contrary to the State's assertion, the plain language contained within section 847.0135(3)(b) does not constitute an explicit statement of intent for purposes of a double jeopardy analysis. The fact that the Legislature has expressly stated that each separate use of a computer to solicit a parent or guardian or

someone believed to be a parent or guardian of a child may be charged as a separate offense does not constitute an explicit statement of intent for purposes of a double jeopardy analysis relating to both sections 847.0135(3)(b) and 847.0135(4)(b). Although 847.0135(3)(b) contains an explicit statement of the Legislature's intent to authorize multiple punishments for each violation of 847.0135(3)(b), said statement is not indicative of a subsequent intent to authorize multiple punishments for conduct that violates both sections 847.0135(3)(b) and 847.0135(4)(b).

Similarly, the plain language contained within section 847.0135(8), Florida Statutes does not constitute an explicit statement of intent for purposes of a double jeopardy analysis. Section 847.0135(8), Florida Statutes provides:

> Prosecution of any person for an offense under this section shall not prohibit prosecution of that person in this state or another jurisdiction for a violation of any law of this state, including a law providing for greater penalties than prescribed in this section or any other crime punishing the sexual performance or the sexual exploitation of children.

Similar language is contained within Section 827.071(6), Florida Statutes:

> Prosecution of any person for an offense under this section shall not prohibit prosecution of that person in this state for a violation of any law of this state, including a law providing for greater penalties than prescribed in this section or any other crime punishing the sexual performance or the sexual exploitation of children.

The provision of section 847.0135(8) allows a defendant who violates 847.0135 to be charged with another offense that is violated by the same act under a *different*

applicable statute, including one with greater penalties. Thus, the statement addresses prosecution under section 847.0135 and subsequent prosecution under a different statute with potentially higher penalties. It does not address multiple prosecutions for offenses contained just within section 847.0135. Additionally, said language, if just meant to be specific to subsection (3) and (4) of section 847.0135, would not be restated in section 827.071(6), a completely different statute. Like section 847.0135, section 827.071 also permits a defendant who violates section 827.071 to be simultaneously charged with other statutory offenses, including ones with greater penalties.

Further, it is respectfully submitted that the fact that Section 847.0135(8) is ambiguous supports the contention that said subsection is not a specific, clear and precise statement of legislative intent to authorize multiple punishments for conduct that violates both section 847.0135(3)(b) and section 847.0135(4)(b), and said ambiguity should be resolved favorably to the Respondent.

Being no explicit statement of intent, the *Blockburger* analysis under section 775.021(4) controls. The State does not dispute that the soliciting offense is subsumed by the traveling offense. Thus, dual convictions for soliciting and traveling violate the prohibition against double jeopardy. This Court should therefore adopt the rationale of the Second District *Shelley*, holding that there is no

explicit statement of intent to authorize multiple punishments for conduct that violates both section 847.0135(3)(b) and section 847.0135(4)(b).

POINT TWO

WHETHER THE SECOND DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT RESPONDENT'S CONVICTIONS IN THIS CASE VIOLATED DOUBLE JEOPARDY PRINCIPLES

As an alternative argument, the State asserts that even if this Court were to conclude that the Legislature has not provided an explicit statement of intent to allow for convictions under sections 847.0135(3) and 847.0135(4), convictions for both are proper in the instant case because the Respondent used the computer four times on the date in question prior to completing the act of traveling. First, it is submitted that if this Court finds that the Legislature explicitly stated its intent to allow separate convictions for soliciting and traveling within section 847.0135, when committed in the same criminal episode, this Court should further find that *Shelley* was decided correctly without further analysis. Second, despite the Respondent's multiple uses of the computer on September 19, 2011, the State did not charge the offenses in this case as occurring during separate criminal episodes; rather, it charged them as occurring during a single criminal episode. Lastly, electronic contact alone is not sufficient to constitute separate offenses under 847.0135(3)(b). Specifically, although the Respondent electronically contacted "Hawkins" multiple times on September 19, 2011 prior to traveling, said contact

did not constitute an "offense" pursuant to under Section 847.0135(3)(b), Florida Statutes, and thus said contact does not support multiple violations of the statute.

First, it is respectfully submitted that the State is confusing the issue before this Court. The issue before this Court is whether the Legislature explicitly stated its intent to allow separate convictions for soliciting and traveling for purposes of a double jeopardy analysis, not whether convictions for both soliciting and traveling may be legally imposed in cases in which the State has not charged separate uses of computer devices to solicit. If this Court finds that the Legislature explicitly stated its intent to allow separate convictions for soliciting and traveling within section 847.0135, this Court should further find that *Shelley* was decided correctly.

The State invoked this Court's discretionary jurisdiction to review the decision of the Second District Court of Appeal in *Shelley* because that decision was certified to be in direct conflict with the decision of the First District Court of Appeal in *Murphy* on a very narrow issue. Specifically, the Second District certified conflict with the First District's decision in *Murphy* "to the extent that it holds that the legislature explicitly stated its intent to allow separate convictions for soliciting and traveling for purposes of double jeopardy analysis". *See Shelley*, 134 So.3d at 1142. The Second District found no explicit statement of intent to authorize multiple punishments for conduct that violates both sections

847.0135(3)(b) and 847.0135(4)(b), whereas the First District reached the opposite conclusion. *See Murphy*, 124 So.3d at 330-31.

Further, the Second District acknowledged that convictions for both soliciting and traveling may be legally imposed in cases in which the State has charged and proven separate uses of a computer devises to solicit, but further found that specific situation inapplicable to Shelley. *See Shelley*, 134 So.3d at 1142. In support, the Second District referenced *Hartley v. State*, 129 So.3d 486 (Fla. 4th DCA 2014) and *Pinder v. State*, 128 So.3d 141 (Fla. 5th DCA 2013). The State takes issue with the Second District's reasoning that convictions for both soliciting and traveling may be legally imposed **only** in cases in which the State has charged and proven separate uses of computer devices to solicit. However, it is submitted that said issue and reasoning is not before this Court for review. Instead, the issue before this Court is whether the Legislature explicitly stated its intent to allow separate convictions for soliciting and traveling for purposes of a double jeopardy analysis.

Nevertheless, it is submitted that the State incorrectly asserts that convictions for both offenses are proper in the instant case because the Respondent used the computer four times on the date in question prior to completing the act of traveling. In *Mizner v. State*, -- So.3d --- (Fla. 2d. 2014); 2014 WL 3734288, the Second District vacated Mizner's judgment and sentences for soliciting a parent to

consent to sex with a minor. *Id*. The State charged, among other things, single counts of soliciting and traveling. *Id.* Both offenses were charged over the same time period, from November 1, 2011, to November 4, 2011. *Id.* The State argued that because the evidence at trial would support a finding that each of the offenses occurred on different days during separate episodes, Mizner's convictions for both offenses were lawful. *Id.* The Second District disagreed with the State and held that despite the charging document alleging multiple days for each offense, under the specific facts and circumstances, "[t]he State did not charge the offenses as occurring during separate criminal episodes; rather, it charged them as occurring during a single criminal episode. ('We find no legal basis to deny a double jeopardy challenge based on uncharged conduct simply because it could have been charged.')" *Id*. (*quoting Shelley*, 134 So.3d at 1142).

As in *Mizner*, the State in *Shelley* did not charge the offenses as occurring during separate criminal episodes; rather, it charged them as occurring during a single criminal episode. The State charged only one use of computer devices to solicit based on the Respondent's conduct that occurred on the same day as the traveling offense, which is an even more narrow charging decision than in *Mizner*. Said charging decision was despite the fact that the Respondent engaged in electronic communication with "Hawkins" over the course of multiple days. One day being on September 16, 2011 in which the Respondent and "Hawkins" had the

most sexually explicit conversation. (R-56). Instead, the State in this case opted to charge the solicitation offense on the same date that the traveling occurred, regardless of the fact that there was no sexually explicit conversation between the Respondent and "Hawkins" on that day. Although the offense of soliciting in this case spanned more than one day, the State charged a single count of soliciting and thus the evidence could not support convictions for both soliciting and traveling as occurring during a separate criminal episode.

Lastly, the evidence in this case does not support multiple convictions for section 847.0135(3)(b). Section 847.0135(3)(b), Florida Statutes allows for a separate charge for each separate use of a computer *"wherein an offense described in this section is committed"* (emphasis added). Although the Respondent electronically contacted "Hawkins" multiple times on September 19, 2011, said contact did not constitute seduction, solicitation, luring or enticing, which is required under Section 847.0135(3)(b), Florida Statutes. Electronic contact alone is not sufficient to support separate offenses under this statute.

The Respondent first electronically contacted "Hawkins" on September 19, 2011, through text message, at 8:47AM asking,

"Are we still on for elven today at starbucks on limebaugh";

and again at 9:03AM stating,

"Im leaving around 1015 so I wont be late I will have on black shorts black shirt jersy is in the wash lol I am excited about meeting Sabrina

and you".

(R-53). The Respondent then emailed virtually the same text one minute later at 9:04. (R-61). At 9:56 AM, the Respondent, through email, requested that "Hawkins" call him and let him know should she need to reschedule. (R-62).

None of the above referenced electronic communication on September 19, 2011 constituted seduction, solicitation, luring or enticing. Because there was no seduction, solicitation, luring or enticing, the separate charge provision under section 847.0135(3)(b) is inapplicable.

If this Court finds that the Legislature explicitly stated its intent to allow separate convictions for soliciting and traveling within section 847.0135, then this Court should further find that *Shelley* was decided correctly.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that this Court affirm the opinion of the Second District in *Shelley v. State*, 134 So. 3d 1138 (Fla. 2d DCA 2014).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this jurisdictional brief will be furnished via the Florida Courts E-Filing Portal at the time of filing to Susan D. Dunlevy, Assistant Attorney General at CrimappTPA@myfloridalegal.com, on this the 14th day of August 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared using Times New Roman 14 point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully Submitted,

/s/ Victoria E. Hatfield
VICTORIA HATFIELD
Florida Bar No. 84248
O'Brien Hatfield Teal, PA
511 West Bay Street, Suite 330
Tampa, Florida 33602
veh@markjobrien.com

ATTORNEY FOR RESPONDENT