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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TIMOTHY TUTTLE, JR.,

Respondent.

Case No. SC14-817

ON DISCRETIONARY REVIEW FROM THE
THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER

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ISSUE: WHEN A DEFENDANT IS FOUND GUILTY OF TWO OFFENSES AND CANNOT BE ADJUDICATED ON BOTH DUE TO THE PROHIBITION AGAINST DOUBLE JEOPARDY, DOES THE TRIAL COURT HAVE DISCRETION TO VACATE THE CONVICTION ON THE GREATER OFFENSE AND IMPOSE SENTENCE ON THE LESSER OFFENSE WHERE THE LESSER OFFENSE CARRIES THE GREATER SENTENCE.

Respondent urges this Court to affirm the Second District's decision in *Tuttle v. State*, 137 So. 3d 393 (Fla. 2d DCA 2014), and adopts the Second District's reasoning in reversing Tuttle's judgment and sentence for armed burglary. However, this argument ignores the fact that there was no double jeopardy violation committed in the trial court. Consequently, *Pizzo* did not provide a basis for the Second District to reverse a properly entered judgment and life sentence on the armed burglary conviction. This case involves a sentencing matter, not a double jeopardy violation. For all of the reasons set forth in the initial brief, *Pizzo* does not support the Second District's ruling in *Tuttle*.

Respondent's overarching argument is that § 775.021(4)(b)3, Fla. Stat., prohibits trial courts from ever sentencing criminal defendants on the lesser offense when he or she is also convicted of the greater offense arising from the same criminal episode. Respondent's interpretation of that subsection fails to give effect to the express legislative intent not to allow the principle of lenity to determine legislative intent. *See* section 775.021(4)(b).

Section 775.021(4), Fla. Stat., is a codification of the *Blockburger* elements test. *See Pizzo v. State,* 945 So. 2d at 1206, citing *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)("The Legislature has stated its intent to convict and sentence for each offense defined as separate under the *Blockburger* test..."); *see also Borges v. State*, 415 So. 2d 1265, 1266 (Fla. 1982)("This statute, an enactment of the 1976 legislature, chapter 76-66, Laws of Florida, was intended to authorize multiple convictions and separate sentences when two or more separate criminal offenses are violated as part of a single criminal transaction, except for lesser included offenses...The statute has abrogated the single transaction rule."). The statutory elements test is used for determining whether offenses are the same or separate for sentencing purposes. It does not dictate the result urged by Respondent that conviction and sentence can only be on the greater offense. *See generally Blockburger; see also Borges v. State,* 415 So. 2d at 1267 ("Therefore, the use of the exclusion of lesser included offenses as a means of indicating when a convicted person may not be separately sentenced does not and cannot contravene the Double Jeopardy Clause.").

The Legislature recognized in drafting § 775.021(4)(b), that there are three situations where its expressed intent to convict and sentence on each criminal offense committed in the course of

one criminal episode is overridden by the prohibition against double jeopardy, and the legislature set them forth in subparagraphs 1, 2, and 3.[1] However, the Legislature did not specify in subparagraphs 1, 2, and 3, which offense must be vacated to avoid double jeopardy. This is consistent with *Blockburger* where the Supreme Court did not specify which offense had to be vacated to avoid double jeopardy.

Respondent correctly states in footnote 3, that subsections 1 and 2 do not specify which conflicting offense should be excepted from the rule thereby leaving it to the discretion of the sentencing judge. However, he carves out subsection 3, claiming discretion is removed from the sentencing judge under that subsection on which offense to vacate, and provides no rationale for the abrupt removal of judicial discretion other than the statutory language itself. This reading is contrary to basic statutory construction principles.

The purpose in construing a statute is to give effect to the Legislature's intent. *See generally Paul v. State,* 129 So. 3d 1058 (Fla. 2013). "A subsection of a statute cannot be read in

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[1] *Valdes v. State*, 3 So. 3d 1067, 107 (Fla. 2009), recognized the 1988 amendment to § 775.021(4), where the Legislature effectively overruled *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), by adding a specific statement of legislative intent to convict and sentence for each criminal offense committed in the course of one criminal episode and not to allow the principle of lenity to determine legislative intent.

isolation; instead, it must be read 'within the context of the entire section in order to ascertain legislative intent for the provision' and each statute 'must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts.'" *Lamar Outdoor Advertising--Lakeland v. Florida Dept. of Transp.*, 17 So. 3d 799, 802 (Fla. 1st DCA 2009), quoting *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008).

The "doctrine of *in pari materia*" is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent." *Id.*, quoting *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 768 (Fla. 2005). Similarly, "[r]elated statutory provisions must be read together to achieve a consistent whole, and...'[w]here possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.'" *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007), quoting *Woodham v. Blue Cross & Blue Shield, Inc.*, 829 So. 2d 891, 898 (Fla. 2002)).

This Court has long recognized that "[i]f a part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the

same statute or others *in pari materia,* the Court will examine the entire act and those *in pari materia* in order to ascertain the overall legislative intent." *Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC,* 986 So. 2d 1260, 1265–66 (Fla. 2008), quoting *Fla. State Racing Comm'n v. McLaughlin*, 102 So. 2d 574, 575–76 (Fla. 1958)).

Respondent reads § 775.021(4)(b)3, in isolation and that reading fails to give effect to the statute as a whole and the express intent not to allow the principle of lenity to determine legislative intent. Respondent's reading fails to comport with the principles of statutory construction.

Under Respondent's view that this subsection mandates that sentence can never be entered on the lesser offense, which would include the cases where the lesser offense carries the greater sentence, that express Legislative intent would be thwarted because lenity would prevail. The lesser offense carrying the greater sentence would be vacated resulting in a windfall to the defendant, the lenient outcome.

Respondent's arguments regarding a sentencing court's discretion and *Tuttle's* potential to infringe on prosecutorial discretion in charging are adequately refuted by the State's arguments in the initial brief and do not require further argument in this Reply.

To correct the record, Respondent repeats an inaccurate assertion made by the Second District in *Tuttle* of the State's position. While discussing *Pizzo*, Respondent states that the State advanced the same position in *Pizzo* that it advanced in this appeal, that the punishments should be considered in determining which offense is the lesser (Respondent's AB, p7). This is inaccurate. The State pointed out to the Second District in its motion for rehearing/rehearing *en banc*, that its argument is that in the unusual case where the subsumed offense carries a greater sentence, that there is no sound reason to vacate a properly obtained conviction which carries the greater sentence simply because its elements are subsumed by another offense. This is a different and legally sound argument which is in agreement with the First, Third, Fourth and Fifth District Courts of Appeal. The Second District refused to correct this inaccurate assertion of the State's position in its *Tuttle* decision.

Last, after the State filed its initial brief on the merits in this matter, the Fourth District entered its decision in *Covello v. State*, 39 Fla. L. Weekly D2172 (Fla. 4th DCA Oct. 15, 2014). In *dicta*, the court stated that the burglary with an assault conviction, although carrying a more severe potential sentence, was the lesser offense for double jeopardy purposes and should have been vacated, citing the Second District's

Tuttle decision. The State has filed a motion for rehearing and rehearing *en banc* because the Fourth District overlooked its decision in *Olivera v. State,* 92 So. 3d 924, 925 (Fla. 4th DCA 2012), where it affirmed the conviction for armed burglary of a dwelling with a battery, a first-degree felony punishable by life, and remanded with directions for the trial court to vacate the conviction and sentence for the attempted home invasion robbery with a firearm conviction, a second-degree felony, thereby creating intra-district conflict. To date, the Fourth District has not ruled on the motion for rehearing/rehearing *en banc*.

CONCLUSION

Based on the foregoing, the State respectfully requests this Honorable Court quash *Tuttle* and approve the decisions in the First, Third, Fourth and Fifth District Courts of Appeal.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been furnished via the Florida Courts e-filing portal on December 1, 2014, to: Benedict P. Kuehne, Special Assistant Public Defender, at ben.kuehne@kuehnelaw.com, dmorgan@pd10.state.fl.us, and appealfilings@pd10.state.fl.us, Office of the Public defender, P.O. Box 9000 -- Drawer Pd, Bartow, Florida 33831.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted,
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