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IN THE SUPREME COURT OF FLORIDA

JAMES WILCOTT,
Petitioner,

v.

CASE NO.: 67,473

STATE OF FLORIDA,
Respondent.

_____ /

FILED

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Chief Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the appellant in the First District Court of Appeal and the defendant in the trial court. The State of Florida was the appellee in the First District Court of Appeal and will be referred to as Respondent before this Court. A one-volume record on appeal and one-volume transcript are sequentially-numbered, and will be referred to as "R" followed by the appropriate page number(s) in parentheses. Attached hereto as an appendix is a copy of the decision of the First District.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

There can be no express and direct conflict below, because the case herein did not involve a violation of the

same statute or an attempt to re-try Petitioner on a separate charge arising out of a single episode.

Conflict jurisdiction is discretionary and no purpose would be served herein by granting certiorari merely to affirm the decision of the First District below.

ARGUMENT

ISSUE

THERE IS NO EXPRESS AND DIRECT CONFLICT WITH DEES V. STATE, 397 So.2d 1145 (FLA. 2d DCA 1981).

In Dees v. State, 397 So.2d 1145 (FLA. 2d DCA 1981), the court held that a defendant who has been tried and convicted of an offense defined by Section 893.13 Florida Statutes, (1979), may not be tried on a second information charging a violation of Section 951.22 Florida Statutes (1979), on double-jeopardy grounds.

Although Dees, supra, is clearly wrong and is decided without benefit of Section 775.021(4) Florida Statutes (1983), or the now clearly established line of cases from Borges v. State, 415 So.2d 1265 (Fla. 1982) to Rotenberry v. State, 468 So.2d 971 (Fla. 1985), this Court need not extend its discretionary jurisdiction merely to affirm the First District at the expense of the Second.

This Court held in Smith v. State, 430 So.2d 448 (Fla.

1983) that "a less serious offense is included in a more serious one if all of the elements required to be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate and discreet and one is not included in the other. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932)." Id. at 449.

Likewise, the construction of Section 944.47 and subsection 3.13(1)(f) require "proof of an element the other does not" and the "offenses are separate and discreet and one is not included in the other". The State was not required to prove possession of some arbitrary amount, more or less than 20 grams of cannabis, only the fact of the possession of contraband, to-wit: cannabis, by an inmate.

Petitioner did not argue that his defense relied on either authority to possess cannabis in a correctional institute, a defense provided in subsection 944.47(1)(a) which reads, "Except through regular channels as authorized by the officer in charge," or that he was not an inmate while he possessed the contraband. In fact, Petitioner stipulated that he was an inmate. (R 75). See subsection 944.47(5)(c) which states that:

It is unlawful for any inmate of any State correctional institution or any person while upon the grounds of any State correctional institution to be

in actual or constructive possession of any article or thing declared by this Section to be contraband, except as authorized by the officer in charge of such correctional institution. [Emphasis supplied.]

Thus by stipulation, Petitioner placed himself squarely within the ambit of subsection 944.47(5)(c) Florida Statutes, (1983), and a jury instruction on the misdemeanor possession as a lesser included offense would have been improper.

In London v. State, 347 So.2d 639 (Fla. 4th DCA 1977), the court held in a case involving similiary issues that:

In determining whether a plea of double-jeopardy can be sustained the test is whether the second prosecution places the defendant twice in jeopardy for the same offense, and not whether he has been tried before on the same acts, circumstances or situation, the facts of which may sustain a conviction for a separate offense. [Emphasis supplied.]

Id. at 640.

The Court then rejected the defendant's therein contention that "Possession of marijuana is a lesser included offense or a lesser degree of the offense of bringing cannabis upon the grounds of a penal institution." Id. at 640.

Respondent agrees with the result in London, supra, but submits that the legal basis for the distinction between Section 944.47 and Section 893.13 is in the Blockburger test and the intent of the legislature to create separate and discreet offenses. The decision in Dees, supra, may be

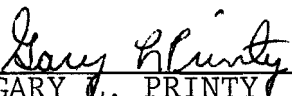
incorrect but there is no reason for this Court to exercise its discretionary jurisdiction to right past wrongs where the end result for the instant petitioner would merely be to affirm the district court below.

CONCLUSION

Petitioner has failed to show the existence of an express and direct conflict between the First District and another district court of appeal and therefore this Court should decline this opportunity to exercise its discretionary jurisdiction.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondent's Brief on Jurisdiction was forwarded to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 28th day of August, 1985.



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