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IN THE SUPREME COURT OF FLORIDA

JAMES WILCOTT, :
Petitioner, :
v. : CASE NO. 67,473
STATE OF FLORIDA, :
Respondent. :
_____ :

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear 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 in parentheses. Attached hereto as an appendix is a copy of the decision of the First District, reported as Wilcott v. State, 472 So.2d 1389 (Fla. 1st DCA 1985).

II STATEMENT OF THE CASE

By information filed August 7, 1984, petitioner was charged with introducing contraband into a state prison (R-1). The cause proceeded to jury trial and at the conclusion thereof petitioner was found guilty as charged (R-9). On September 10, 1984, petitioner was adjudicated guilty and sentenced to 5 1/2 years in state prison (R-10-12; 14-18). Petitioner's motion for new trial (R-13) was orally denied (R-146-48).

On September 13, 1984, a timely notice of appeal was filed (R-19). By opinion filed August 1, 1985, the First District affirmed petitioner's judgment and sentence (Appendix). On August 9, 1985, a timely notice of discretionary review was filed. On February 5, 1986, this Court accepted jurisdiction.

III STATEMENT OF THE FACTS

Correctional Officer Leroy Green testified that on July 20 he brought petitioner back to the Marianna Community Correctional Center from his outside work. During a routine search, he found a package of rolling papers. He did a further search and found a baggie, which appeared to contain marijuana, in petitioner's underwear (R-52-67). Laboratory Analyst Sherma Moore was stipulated to be an expert. She determined the substance was cannabis, and weighed 2.3 grams (R-94-100).

Petitioner, age 25, testified that he was serving an eighteen month sentence for burglary, and was due to be released on August 1. While at work, he found a bag of marijuana and stuck it down his pants. He intended to leave the baggie at work and enjoy it later. He did not intend to take it back into the prison, but he did not have time to leave it at work when Officer Green arrived (R-102-18).

Petitioner's counsel noted that he had requested a jury instruction on possession of marijuana as a lesser offense, which had been denied at a charge conference. The court agreed that the request had been denied (R-145). Petitioner's motion for new trial again raised the question of whether the court erred in refusing to instruct on misdemeanor possession of marijuana as a lesser offense (R-13). This motion was argued and orally denied (R-46-48).

On appeal, petitioner again argued that the jury should

have been instructed on misdemeanor possession of marijuana as a lesser offense. The First District disagreed and affirmed petitioner's judgment and sentence (Appendix).

IV SUMMARY OF ARGUMENT

Petitioner will argue in this brief that where introduction or possession of contraband are charged in the alternative in the information, simple possession becomes a category two lesser offense of introduction, and thus requires that the jury be instructed on and given a verdict form for simple possession, where the proof at trial reveals that petitioner did not intend to introduce the contraband, only to possess it at his work site.

V ARGUMENT

ISSUE PRESENTED

THE LOWER COURTS ERRED IN DETERMINING THAT SIMPLE POSSESSION OF CONTRABAND IS NOT A CATEGORY TWO LESSER INCLUDED OFFENSE OF INTRODUCING CONTRABAND INTO A PENAL INSTITUTION.

The information charged that petitioner:

On or about the 20th day of July, 1984, in Jackson County, Florida, did unlawfully introduce into or possess upon the grounds of a state correctional institution, to-wit: The Marianna Community Correctional Center, a contraband article, to-wit: Cannabis, in violation of Section 944.47, Florida Statutes....

(R-1; emphasis added). This is a violation of Section 944.47, Florida Statutes (1983), which prohibits both the introduction of contraband into a prison, or the possession of such contraband.

In order to be a category four (now category two) lesser offense, both the allegation of the information and the proof at trial must support the lesser crime. Brown v. State, 206 So.2d 377 (Fla. 1968). Here, the information charged introduction or possession in the alternative. The evidence at trial showed that petitioner was in actual possession of the contraband at the same time he introduced it into the prison. Since there was a completed act, attempt is not a lesser offense. Fla.R.Crim.P. 3.510(a). Since the amount of the contraband was less than 20 grams, the only proper lesser offense was misdemeanor possession. Section 893.13(1)(f),

Florida Statutes (1983). The failure to instruct on the next-lower lesser offense is always reversible error. State v. Abreau, 363 So.2d 1063 (Fla. 1978). The only verdicts available to petitioner's jury were guilty as charged or not guilty (R-8).

In Dees v. State, 397 So.2d 1145 (Fla. 2d DCA 1981), the court construed Section 951.22, Florida Statutes (1979), which is a parallel statute prohibiting introduction into or possession of contraband inside of a county jail. That statute provided:

It is unlawful except as duly authorized by the sheriff or officer in charge to introduce into or possess upon the grounds of any county detention facility . . . the following articles which are hereby declared to be contraband for purposes of this act, to wit: . . . any narcotic, hypnotic, or excitative drug

The defendant pled guilty to misdemeanor possession of marijuana in county court. He was then prosecuted for the felony of introducing or possessing the same contraband and claimed double jeopardy. The Second District distinguished London v. State, 347 So.2d 639 (Fla. 4th DCA 1977) and held:

Here, however, Dees' possession of marijuana was category four lesser-included offense of his simultaneous introduction or possession of the same marijuana into the county detention facility.

Id. at 1146. Thus, because misdemeanor possession was a lesser offense of introducing or possessing in the county jail, double jeopardy barred a prosecution for the greater crime.

London, supra, had held that possession of marijuana was not a lesser of introduction under the version of Section 944.47, Florida Statutes (1975), which provides:

It is unlawful to introduce into or upon the grounds of any correctional or penal institution, . . . any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit:
. . . any narcotic or hypnotic or excitative drug or any drug of whatever kind or nature

The difference between London and Dees may be explained by examining the statute at issue. The county jail statute expressly included possession within its terms, while the state prison statute in effect at that time did not.

In Tessier v. State, 462 So.2d 123 (Fla. 2d DCA 1985), the Court followed its earlier decision in Dees, and held that one could not be convicted of both introduction and possession of contraband in a county jail, where, even though different statutes were involved:

The question here is whether the two offenses are separate offenses. If so, convictions for both offenses are not prohibited. The test is "[i]f each crimes...requires an element of proof that the other does not, then ...[t]hey are separate offenses." State v. Baker, 456 So.2d 419 (Fla. 1984). In this case, all elements of the simple possession offense under Section 893.13 are contained within the elements of the introduction or possession of contraband offense under Section 951.22. Section 951.22 proscribes the introduction or possession of contraband into a county detention facility and specifically includes "controlled substances" as

being within the definition of contraband. Section 893.13 proscribes the unlawful possession of controlled substances. Thus, we conclude that these two offenses are not separate offenses.

Id. at 124.

The present state prison statute, under which petitioner was charged, now includes either possession or introduction within its terms:

(1) (a) Except through regular channels as authorized by the officer in charge of the correctional institution, it is unlawful to introduce into or upon the grounds of any state correctional institution...any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit: ...4. Any narcotic, hypnotic, or excitative drug or any drug of whatever kind or nature....

* * *

(c) It is unlawful for any inmate of any state correctional institution or 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.

Section 944.17(1)(a)4 and (c), Florida Statutes (1983).

Thus, London, supra, which construed the prior statute in which possession was not an element, is no longer valid and the holdings of Dees and Tessier, which construed the parallel county jail statute in which possession is an element, are fully applicable to the present case. Because

the present statute prohibits the introduction or possession of contraband, because the information charged the alternative crimes, and because the proof at trial showed that petitioner possessed the marijuana at the same time he introduced it, and created a jury question as to whether he intended to introduce it, misdemeanor possession was a category two lesser offense of the crime charged.

Two other recent Second District cases provide support to petitioner's argument, by analogy. In Murray v. State, 464 So.2d 622 (Fla. 2d DCA 1985) and Williams v. State, 464 So.2d 624 (Fla. 2d DCA 1985), the court held that simple possession of contraband, a crime defined by Section 893.13(1)(e), Florida Statutes (1985), was a lesser included offense of possession of contraband with intent to sell, a crime defined by Section 893.13(1)(a), Florida Statutes (1985), so that the defendants could not be convicted and sentenced on both simple possession and possession with intent to sell. The court reasoned that since possession with intent to sell contained possession as an essential element, and since possession contained no additional elements, double jeopardy barred a conviction and sentence on both.

The same is true in the instant case. Section 944.47(1)(a), Florida Statutes (1985) prohibits introduction of contraband. Section 944.47(1)(c), Florida Statutes (1985)

prohibits actual or constructive possession of contraband. Since petitioner had actual possession at the time he introduced the contraband, simple possession becomes a lesser included offense.

This Court must disapprove the holding in the instant case, approve the holdings in Dees and Tessier, and grant petitioner a new trial because the jury was not given the opportunity to find him guilty of simple possession as a proper category two lesser offense.

VI CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court quash the opinion of the lower tribunal, and remand with directions that petitioner be awarded a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mr. Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, Mr. James Wilcott, #906768, Reception and Medical Center, Post Office Box 628, Lake Butler, Florida, 32054, this 13 day of February, 1986.



P. DOUGLAS BRINKMEYER