

IN THE SUPREME COURT OF FLORIDA

JAMES WILCOTT,
Petitioner,

v.

CASE NO.: 67,473

STATE OF FLORIDA,
Respondent.

_____ /

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RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32301

(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent accepts Preliminary Statement of Petitioner.

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts with the following addition.

Petitioner stipulated to being an inmate. (R 75).

SUMMARY OF ARGUMENT

Possession of less than 20 grams of cannabis is not a lesser included offense of possession of contraband in a State correctional institution. Possession of contraband in a prison facility is a separate and distinct evil with defferent and more socially severe consequences than mere possession by a civilian for "personal use."

ARGUMENT

ISSUE

THE LOWER COURT CORRECTLY HELD
THAT SIMPLE POSSESSION OF
CONTRABAND IS NOT A CATEGORY
II LESSER INCLUDED OFFENSE OF
INTRODUCING CONTRABAND INTO A
STATE CORRECTIONAL INSTITUTION.

Petitioner argues that Section 944.47 Florida Statutes (1983) proscribes the introduction or possession of contraband by an inmate in a State correctional institution. Cannabis is a contraband, so therefore simple possession of marijuana is a lesser included offense of Section 944.47 and the jury should have been so instructed because Petitioner lacked intent to possess the contraband on the grounds of the State institution. He relies upon Dees v. State, 397 So.2d 1145 (Fla. 2d DCA 1981), and Tessier v. State, 462 So.2d 123 (Fla. 2d DCA 1985).

Respondent answers that the lower court opinion correctly rejects this argument because simple possession of less than 20 grams of cannabis is not a lesser included offense of possession of contraband under Section 944.47(1)(a)(1-5) which may include articles of food, clothing, weapons, or intoxicating beverages. Nor is intent to introduce or possess the contraband an element of Section 944.47(1)(c). Another factor not overlooked below was the obvious legislative intent to deal harshly with those who possess contraband on the grounds of

a State correctional institution. Petitioner was convicted of a second-degree felony. The defendants in Tessier and Dees, supra, violated Section 951.22 Florida Statutes, a third-degree felony.

Respondent also submits that Section 893.13(1)(f) Florida Statutes (1983) makes possession of less than 20 grams of cannabis for a person who is not an inmate and who is not on the grounds of a State prison, a misdemeanor. Likewise, a person outside a prison may possess a knife or firearm but an inmate in prison clearly should not and is not allowed to do so.

This Court stated in Smith v. State, 430 So.2d 448 (Fla. 1983) that "A less serious offense is included in a more serious one if all 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 discrete 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.

Similarly, the construction of the instant statute Section 944.47 and subsection 893.13(1)(f) require "proof of an element the other does not" and the "offenses are separate and discrete 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 possession of

contraband, to-wit: cannabis, by an inmate.

Petitioner makes no argument that its 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 and have vitiated the clear legislative intent of Section 944.47.

In London v. State, 347 So.2d 639 (Fla. 4th DCA 1977), the court held, in a case involving similar 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 upon 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 contention therein that "possession of marijuana is a lesser-included offense or 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 discrete offenses and punishments. The decision in Dees v. State, 397 So.2d 1145 (Fla. 2d DCA 1981), is incorrect. However, the court in Dees, supra, was without the benefit of Borges v. State, 415 So.2d 1265 (Fla. 1982) and Smith, supra.

Respondent submits that Tessier, supra, is likewise an incorrect application of this Court's decision in State v. Baker, 456 So.2d 419 (Fla. 1984), a case in the Borges line of cases on double-jeopardy concerns.

The court below correctly noted that in proving a violation of Section 944.47 the prosecution need only show that there was possession of contraband by an inmate, or any person upon the grounds of a State correctional institution, and that contraband need not be shown to be cannabis, nor is it necessary

to prove the existence or to offer evidence of a certain amount of cannabis. The fact that the legislature chose to make a violation of Section 944.47(1)(a)1 or subparagraph (1)(a)2, a felony of the third degree but all other felonies of the second degree, "clearly reveals the legislature's intent to prohibit the possession of any contraband by an inmate." Wilcott v. State, 472 So.2d 1389,1391 (Fla. 1st DCA 1985).


Petitioner claims that he had no intent to introduce or possess contraband in the prison as he knew this to be illegal. Respondent denies intent is an element of the offense and finds little support for the claim in the record. The concealment of the contraband on Petitioner's person belies his self-serving testimony that he intended to leave the contraband at the job site.

CONCLUSION

The legislature was free to create a separate crime for possession of cannabis by an inmate on the grounds of a State correctional institution and to allow that inmate to be treated as if he were not an inmate on the grounds of a State correctional institution would be a pure mockery of the legislative intent of Section 944.47. This Court should affirm the opinion of the First District Court of Appeal entered below.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL




GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32301

(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was forwarded to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 5th day of March, 1986.



GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL