

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

BRUCE EDWARD GORDON,

Respondent.

Case No. 72,850

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON MERITS

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER  
ASSISTANT PUBLIC DEFENDER

Public Defender's Office  
Tenth Judicial Circuit  
P. O. Box 9000--Drawer PD  
Bartow, FL 33830  
(813) 534-4200

ATTORNEYS FOR ~~PETITIONER~~

*Respondent*

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's State of the Case and Facts with such exceptions or additions as noted in his argument below.

### SUMMARY OF THE ARGUMENT

Convictions for both sale of one rock of cocaine and possession with intent to sell that same rock cannot be sustained as such a result violates the double jeopardy provisions of the United States and Florida Constitutions. There is evidence of legislative intent that possession with intent to sell is a lesser of sale, a strict Blockburger analysis demonstrates that possession is a lesser of sale, and the rule of lenity--which must be applied when there is doubt--requires a finding that possession is a lesser of sale.

ARGUMENT

ISSUE

IN APPLYING CARAWAN V. STATE, 515 SO.2D 161 (FLA. 1987), TO THE FACTS OF THIS CASE, DO CONVICTIONS AND SENTENCES FOR THE CRIMES OF SALE OF ONE ROCK OF COCAINE AND POSSESSION WITH INTENT TO SELL THAT SAME ROCK OF COCAINE VIOLATE THE DOUBLE JEOPARDY PROTECTION PROVIDED BY THE STATE AND FEDERAL CONSTITUTIONS?

The question presented in this case is whether selling cocaine is the same offense as possessing that same cocaine with intent to sell. Although the information against the Appellant refers to delivery of cocaine as well as sale, these references are irrelevant since the facts clearly show a sale with consideration (R29). Thus, despite the Petitioner's claim that this case could be dealing with only delivery, the facts and the Second District Court of Appeal's opinion deal only with a completed sale. Under the decision set forth by this court in Carawan v. State, 515 So.2d 161 (Fla. 1987), it is clear that two convictions cannot be obtained for both selling a rock of cocaine and possessing with intent to sell the same exact rock.

The test set forth in Carawan is as follows: (1) absent a violation of constitutional right, legislative intent regarding intended penalties controls; (2) absent clearly discernable legislative intent, the court begins by using the Blockburger test and compares elements of the crimes in question; and (3) the court must resolve all doubts in favor of lenity toward the accused. Blockburger, Carawan notes, is not to be

applied blindly, mechanically, and exclusively to every multiple-punishments problem. It is only a rule of construction to be used as an aid in determining the legislative intent behind particular penal statutes when the intent is unclear. This court went on to note that an exclusive Blockburger analysis sometimes leads to a result contrary to common sense. The courts are obligated to avoid construing a particular statute so as to achieve an absurd or unreasonable result. As pointed out in Bing v. State, 492 So.2d 833 at 835, 836 (Fla. 5th DCA 1986), a strict Blockburger analysis often "falsely indicate[s] a substantive difference between degrees of one substantive offense."

Legislative intent, according to Carawan, is the most important factor to consider in deciding a multiple-punishments issue, and this court listed several factors relevant to discerning the legislature's true intent, including: "the circumstances and documentation accompanying a law's enactment, its evident purpose, the particular evil it seeks to remedy, the fact that it seeks to protect a particular class or remedy a special problem, or other relevant factors." Id. at 167. In discussing previous statutes that address essentially the same evil, this court specifically noted that, "because of the constant patchwork revisions of Florida's criminal code, certain statutes may be drafted only to punish for frustrated criminal attempts, or to provide special penalties for crimes that essentially are only aggravated versions of other crimes, although perhaps going under different names." Id. at 168.

These instances, this court stated, are not intended to be punished separately as they manifestly address the same evil. As a result of this analysis, this Court receded from two of its own recent cases: State v. Rodriguez, 500 So.2d 120 (Fla. 1986); and Rotenberry v. State, 468 So.2d 971 (Fla. 1985).

In receding from Rotenberry, this court noted that the sale of drugs can constitute a separate crime from possession "under the appropriate circumstances." Carawan, supra at 170. Unfortunately, this court did not explain this phraseology and left hanging the question: When would the circumstances constitute only one crime? Respondent contends that only one crime exists when the sale and possession constitutes one act. In addition, the crimes of sale and possession with intent to sell are the same because the legislature placed both crimes in one statutory provision and imposed the same punishment--section 893.13(1)(a), Florida Statutes. When, as in this case, the defendant sold what he possessed with the intent to sell, factually only one single act is being addressed and legally only one single evil is being punished--the distribution of a drug.

In discerning legislative intent there is also the consideration of whether absurd or unreasonable results are reached in determining the crimes to be separate. A strict Blockburger analysis splits section 893.13(1)(a) into separate little factions and makes each faction a separate crime: sell, manufacture, deliver, possess with intent to sell, possess with intent to manufacture, or possess with intent to deliver.

According to the State's reasoning, this one statute which addresses the evil of distributing or the attempt/intent to distribute and applies the same punishment is now six different crimes. Instead of a more common sense approach, as pointed out in Carawan, that would hold the possession crimes to be frustrated attempts or less aggravated versions of the actual crimes of sale or manufacturing or delivery, the Blockburger analysis creates the unreasonable result of multiple crimes and punishments for one act and one evil in spite of the legislative intent to give the prosecutor several ways to prove one offense. In other words, there is more than one way to skin a cat; but the legislature intended only one cat/crime.

Even though the Second District Court of Appeal found no indication of legislative intent on this issue in Gordon, the above-stated arguments demonstrate a legislative intent to prohibit two convictions for both sale and possession with intent to sell the same drug. At the very least, the above-stated arguments demonstrate a lack of intent to impose multiple punishments in this case. This the Second District Court of Appeal did agree with on pages 10 and 11 of its slip opinion. The Gordon decision, however, clearly demonstrates that two convictions in this case violate double jeopardy provisions even with the application of a strict Blockburger analysis.

Because the Second District Court of Appeal's opinion sets forth a thorough analysis of Blockburger as it applies to this case, Respondent relies heavily on the opinion for this part

of the argument:

In order for the crimes to be separate we must find that each crime contains an element not contained within the other. Id. We begin our discussion with the possession element of these two crimes. A defendant cannot be convicted of either crime unless he is deemed, at law, to have had some sort of possession of the contraband. As to the crime of sale, a defendant need not be the actual possessor of the contraband although such actual possession will naturally result in criminal sanctions as in the instant case. The possessory element can be shared by others legally responsible for the crime. For example, a person acting as a go-between or broker may arrange for or be the moving force in the sale of contraband, yet never have either actual nor constructive possession of the contraband. In such a case, the act of the seller who has actual possession of the contraband becomes the act of the broker. The broker is deemed to have the same possession as the seller and can be convicted as a principal of the crime of sale under Chapter 777, Florida Statutes. As to the crime of possession-with-intent-to-sell, we need not elaborate on the obvious, to wit, possession is an element of this crime. In the case before us, then, where there is no question of a broker or others involved in the crime charged, but rather a single act with a single defendant, we conclude that the first element of the crime of sale of contraband as well as the crime of possession-with-intent-to-sell contraband is possession.

We turn now to the next element, intent. All criminal behavior requires proof of criminal intent, the mens rea, which serves to distinguish such behavior from accidental (noncriminal) behavior or negligent behavior. See generally W. LaFave and A. Scott, Substantive Criminal Law section 3.5(e) (1986). There is no question that the intent element in the crime of possession-with-intent-to-sell is "intent to sell." Regarding the crime of sale, we discern also that the intent there is "intent to sell" because a person will not (or cannot)

voluntarily effectuate a sale without desiring such result. "[A] man is to be taken to intend what he does, or that which is the necessary and natural consequence of his own act." R. Perkins, Perkins on Criminal Law 748 (2d ed. 1969), citing Harrison v. Commonwealth, 79 Va. 374, 377 (1884). We conclude, therefore, that the two crimes at issue here so far involve the same two elements: possession and intent. This is the point where the similarity between these two crimes ends.

The sum of the elements of the crimes of possession-with-intent-to-sell is two (2): the state must merely prove the defendant (a) possessed the contraband with (b) the intent to sell it. The crime of sale of contraband contains these two elements plus a third. This third element is the actual sale as defined in Florida Standard Jury Instructions in Criminal Cases (1987 ed.), page 219: "'sell' means to transfer or deliver something to another person in exchange for money or something of value or a promise of money or something of value." It will be evident that in contrasting the component elements of these two crimes that in proving the elements of sale, the prosecution cannot also help but prove the elements of possession-with-intent-to-sell. Two of our sister courts have reached this same conclusion. Fletcher v. State, 428 So.2d 667 (Fla. 1st DCA 1982), petition for review denied, 430 So.2d 452 (Fla. 1983) (a pre-Carawan decision), and Smith v. State, No. 87-0007 (Fla. 4th DCA Apr. 13, 1988) [13 F.L.W. 925], (a post-Carawan decision). The fourth district in Smith has acknowledged conflict on this question with our own pre-Carawan opinion in Dukes v. State, 464 So.2d 582 (Fla. 2d DCA 1985).

To the extent Dukes conflicts with Carawan, it, of course, does not survive. Dukes noted that the crime of possession-with-intent-to-sell does not include the element of sale. This is indeed true as we have concluded in the instant case. Our analysis in Dukes was correct so far as it went, but it was, as we learn in Carawan, incomplete. In Dukes we failed to continue on to the next step to delineate the unique

element that the crime of possession-with-intent-to-sell contraband has that the crime of sale of contraband does not. Without this further inquiry the Blockburger analysis was incomplete as it regarded these two crimes. A complete Blockburger inquiry would have revealed that the crime of possession-with-intent-to-sell contained no element not also contained within the crime of sale. Dukes was correct, however, in its disposition of the third case discussed in the opinion, 464 So.2d at 584 (Case No. 83-2369), because the factual circumstances showed that the appellant had placed a baggie of marijuana in a nearby window--thus committing the crime of possession marijuana with intent to sell--just after selling a completely different baggie of marijuana to a passenger in a passing car. Thus, the two crimes were predicated upon separate acts and the appellant was then properly convicted and punished for both. In summary, that part of Dukes finding no double jeopardy violation for two crimes predicated upon a single act, relying on the incomplete Blockburger test, is no longer viable after Carawan; thus, we today recognize the primacy of Carawan and find ourselves in harmony with our colleagues in the first and fourth districts on this issue.

Gordon, slip opinion 4-9, as modified in motion for rehearing.

The important aspect of this portion of the opinion is that the Second District Court of Appeal found possession to be an essential element of both sale and possession with intent to sell. Although the State claims sale "may frequently be accompanied by possession," it fails to cite the type of situation where sale is not accompanied by possession. In this day of convictions established by conspiracies and hearsay statements in which defendants are convicted and sentenced as principals even though they may never have actually touched the drugs or seen the drugs, or been near the drugs, it is impossible

to imagine a situation where a defendant would be guilty of sale and not possession. With the aider and abettor section under principals and conspiracy exceptions to the hearsay rule, the concept of possession becomes much broader.

In addition, the State's argument that separate evils are being addressed by these two charges because possessing with intent to sell is aimed at punishing the individual while sale involves the participation of others is an argument that also cannot be supported by factual examples. Possession with intent to sell must necessarily include the prospect of others being involved eventually or the charge would just be simple possession; and with police undercover operations, there are legions of cases where defendants sold--as in Gordon's case--to an undercover officer. That type of sale did not involve the arrest of anyone else.

As can be seen from the Gordon decision, the situation of sale and possession with intent to sell the same substance fits the Blockburger test--even under a strict analysis. If there is any doubt, however, the rule of lenity must be applied. This is true in spite of the legislature's recent changes to the rules of construction as set forth in section 775.021, Florida Statutes (Supp. 1988).

Carawan only applies the rule of lenity when legislative intent cannot be determined and is equivocal on the issue of multiple punishments. It is a rule of last resort based not only on Florida's statutes but also on our common law.

As pointed out in Carawan, supra at 165, 166:

The third rule is that courts must resolve all doubts in favor of lenity toward the accused. This "rule of lenity," a part of our common law, has been codified in section 775.021(1), Florida Statutes (1985):

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

The United States Supreme Court, interpreting the federal rule of lenity, has characterized it as

a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Quoting Ladner v. United States, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958), we stated: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."

Albernaz v. United States, 450 U.S. 333, 342, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981) (citation omitted). Our prior decisions also have described Florida's own rule of lenity as:

a fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed. Ferguson v. State, 377 So.2d 709 (Fla. 1979). We have held that "nothing that is not clearly and intelligently described in [a penal statute's] very words,

as well as manifestly intended by the Legislature, is to be considered as included within its terms.'" State v. Wershow, 343 So.2d 605, 608 (Fla. 1977), quoting Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927).

Palmer v. State, 438 So.2d 1, 3 (Fla. 1983).

Quite simply, if the courts cannot determine whether or not the legislature intended multiple punishments, then all doubts must be resolved in favor of the defendant. It would be a violation of due process to deprive a person of his liberty on the basis of pure guesswork in trying to determine legislative intent. And if the courts cannot determine legislative intent, how is the individual supposed to be aware of the legal consequences and possible punishments for his acts? Doubts that directly affect an individual's liberty must be resolved in favor of the defendant.

The State argues that the recent statutory changes in section 775.021 are a direct result of the legislature's dissatisfaction with Carawan and clearly states that the rule of lenity is not to be applied. If this is, indeed, the legislative intent of the changes to section 775.021, then the legislature's attempt to do away with the rule of lenity must be held unconstitutional as it violates due process. To do away with the rule of lenity would, in effect, require the law to be that any doubts on multiple punishments must be resolved in favor of the State. The State is entitled to no such presumption. The United States and Florida constitutions reject such a concept.

It is to be questioned, however, whether the new

statute changes actually do try to eliminate the rule of lenity. The new changes try to restate a Blockburger test for what is the same criminal offense, but the courts will still be left with questions on legislative intent on a case-by-case basis. The general language set forth in section 775.021(4)(b) will not cure the problems discussed in Carawan, and the courts will be back to trying to figure out legislative intent in the absence of clear statutory language and in situations where the Blockburger test reaches absurd results. In spite of the legislature's desire not to use the rule of lenity, the courts have no other options when patchwork statutes leave all in the dark.

Should this court disagree and find the new statute to have done away with the rule of lenity, then the new rule should not be applied to this case as it would be an ex post facto application of the law. Such a change in the law is one of substance. Carawan, supra at 165. It also vastly increases the punishment in that it provides multiple punishments for one act that would have only resulted in one punishment prior to the change. The change is more onerous than the prior law and alters a substantial right in its treatment of multiple punishments. Even though the statute may look procedural in form, its effects makes a defendant's punishment more onerous for a single act of a criminal nature than before its enactment. See Miller v. Florida, 482 U.S. \_\_\_\_, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). In the alternative, if this change is a procedural rule change, then it obviously has a disadvantageous effect on an offender and

cannot be applied to crimes committed before the effective date of the rule of change. Lewis v. State, 475 So.2d 1367 (Fla. 1985).

CONCLUSION

Based on the above-stated facts, arguments, and authorities, Respondent asks this Honorable Court to uphold the order of the Second District Court of Appeal.

Respectfully submitted,

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
FLORIDA BAR NUMBER 0143265  
TENTH JUDICIAL CIRCUIT

  
DEBORAH K. BRUECKHEIMER  
Assistant Public Defender

Public Defender's Office  
Tenth Judicial Circuit  
Polk County Courthouse  
P. O. Box 9000--Drawer PD  
Bartow, FL 33830  
(813) 534-4200

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished to the Attorney General's Office, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida 33602, by mail on this 22<sup>d</sup> day of September, 1988.

  
DEBORAH K. BRUECKHEIMER