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IN THE FLORIDA SUPREME COURT

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STATE OF FLORIDA,

Petitioner,

v. Case No. 73,700

BOBBY JOE BURTON,

Respondent.

FILED
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JUN 13 1989
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Deputy Clerk

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

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Prosecution in the trial court and the Appellee in the Second District Court of Appeal. Respondent, Bobby Joe Burton, was the defendant in the trial court. The parties will be referred to by their proper names or as they stood before the trial court. The record on appeal consists of one (1) volume and will be referred to by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The State of Florida will rely the pertinent facts set forth by the Second District Court in its opinion below:

> "Defendant was charged by information with six counts of drug-related offenses: (1) delivery of cocaine; (2) possession of cocaine; (3) possession of marijuana; (4) possession of cocaine; (5) possession of diazepam; and (6) possession of codeine. Defendant filed a plea of guilty to Counts I and II and a plea of nolo contendere to the remaining counts, reserving his right to appeal the trial court's denial of his motion to suppress contraband. After a judgment was entered, defendant received an eighteen month sentence for Count I and separate eighteen months sentences for each of the remaining counts, to run concurrent to his sentence for Count I.
>
> The affidavit in support of the information revealed that counts I and II were based on a single incident occurring on January 2, 1987, where defendant had in his possession and sold to an undercover detective of the St. Petersburg

> Police Department a half gram of cocaine. . ."
> As we recently stated in Fuentes v. State, No. 87-2071, slip op. at 3 (Fla. 2d DCA Nov. 9, 1980) [13 F.L.W. 24851, "[i]t is now well established that a defendant may not be convicted of both delivery and possession of cocaine predicated on a single underlying act." See Carawan v. State, 515 So.2d 161 (Fla. 1987); Gordon v. State, 538 So.2d 910 (Fla. 2d DCA 1988). Accordingly, we find that defendant's convictions for both Counts I and II violated his double jeopardy rights under the federal and state constitutions.
>
> Reversed and remanded to the trial court with directions to vacate the conviction for either Count I or II and for resentencing consistent with this opinion.
>
> Burton v. State, 541 So.2d 1203 (Fla. 2d DCA 1988).

Relying on Carawan v. State, 515 So.2d 161 (Fla. 1987), the Second District Court determined that Burton's convictions for both Counts I (Delivery of Cocaine) and II (Simple Possession of Cocaine) violated his double jeopardy rights under the federal and state constitutions.

On February 2, 1989, the State's Motion for Rehearing was denied by the Second District Court. On February 8, 1989, the State filed its Notice to Invoke Discretionary Jurisdiction on the basis of alleged conflict of decisions; and on May 15, 1989, this Honorable Court accepted jurisdiction to review this appeal.

SUMMARY OF THE ARGUMENT

The district court erred, first, in reaching the merits of the defendant's double jeopardy claim and, second, in concluding that only one judgment and sentence is permissible for the offenses of simple possession of cocaine and delivery of cocaine. It is possible for the one offense to be completed without necessarily proving the other and so the Blockburqer test is satisfied. The court below erred in believing that the legislature intended a single punishment when the legislature's expressed view is to the contrary.

ARGUMENT

ISSUE

WHETHER THE DEFENDANT'S GUILTY PLEAS TO COUNTS I AND II OF THE INFORMATION PRECLUDE APPELLATE REVIEW OF HIS CONVICTIONS AND WHETHER THE SEPARATE CONVICTIONS AND SENTENCES FOR POSSESSION OF COCAINE AND DELIVERY OF COCAINE VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The State charged the defendant, Bobby Joe Burton, in a six-count Information with violations of Florida Comprehensive Drug Abuse Prevention and Control Act. (R. 14-15). On August 12, 1987, the defendant entered pleas of guilty to counts I and II of the Information, which charged Burton with (I) delivery of cocaine, a violation of §893.13(1)(a), Florida Statutes and (II) possession of cocaine, a violation of §893.13(1)(f), Florida Statutes; these offenses were alleged to have occurred on January 2, 1987. Burton also entered pleas of nolo contendere to Counts III-VI of the Information, which charged drug-related offenses committed on January 9, 1987. The defense specifically reserved its right to appeal the denial of the motion to suppress relating to Counts II - VI involving evidence seized as the result of a search warrant executed on January 9th. (R. 111, 115, 117-118).

Rule 9.140 (b)(10), Florida Rules of Appellate Procedure, directs that the defendant may not appeal from a judgment entered upon a plea of guilty. See also, §924.06(3), Florida Statutes.

By virtue of his guilty pleas to the charges of possession of cocaine and delivery of cocaine, the defendant obviated any need for the State to set forth its entire case and detailed factual proof in support of the delivery and possession charges. Under the circumstances of this case, the Second District Court erred in utilizing the arrest affidavit as the vehicle for reaching the merits of the defendant's double jeopardy claim. The mere fact that a defendant both sold and possessed cocaine on a single date does not ipso facto support a claim that the double jeopardy clause was violated under Carawan. See, e.g. Leeks v. State, 529 So.2d 787, (Fla. 2d DCA 1988); Newsome v. State, So.2d ____, 14 F.L.W. 1298 (Fla. 2d DCA Case No. 88-2204, Opinion filed May 26, 1989). [Separate convictions and sentences for possession with intent to sell and sale of cocaine; No violation of prohibition against double jeopardy where the defendant possessed multiple cocaine rocks, but he sold only one and kept the remainder in his possession. In Newsome, the officers testified at trial to the presence of other rocks of cocaine in the defendant's possession at the time they purchased one rock. Here, Burton's guilty pleas made it unnecessary for the State to present extensive witness' testimony on this claim.]

Notwithstanding the jurisdictional bar raised below, the Second District Court nevertheless concluded that the double jeopardy clause was violated by the defendant's conviction for both simple possession of cocaine and delivery of cocaine. The State renews its argument that review of this issue is foreclosed

by virtue of the defendant's guilty plea and urges this court to reverse the decision below. Furthermore, for the following reasons, the defendant's Carawan-based double jeopardy claim must fail.

In Count I of the Information, the State alleged that the defendant, Bobby Joe Burton, on the 2nd day of January 1, 1987,

> "did unlawfully deliver a certain controlled substance, to-wit: cocaine, to another person; contrary to Chapter 893.13, Florida Statutes, and against the peace and dignity of the State of Florida.

Count II of the Information charged:

> "And the State Attorney aforesaid, under oath as aforesaid, further information makes that BOBBY JOE BURTON, of the County of Pinellas, State of Florida, on the 2nd day of January, in the year of our Lord, one thousand nine hundred eighty-seven, in the County and State aforesaid, did unlawfully possess and have in his control, a certain controlled substance, to-wit: cocaine; contrary to Chapter 893.13, Florida Statutes, and against the peace and dignity of the State of Florida.
>
> (R. 10; 14).

The test of Blockburger v. United States, 284 U.S. 299, 76 L.Ed.2d 306, 52 S.Ct. 180 (1932) is satisfied because each offense requires proof of a fact that the other does not. In applying this test,

> The court must determine whether each offense as defined in the statute requires proof of a fact that the other does not, without regard to the accusatory pleadings or proof adduced at trial. If they do not, the offenses are presumed to be the same, and multiple punishments are improper in the absence of

> express legislative authorizaiton. . . . On the other hand, if each offense indeed requires proof of a fact that the other does not, the court then must find that the offenses in question are separate, and multiple punishments are presumed to be authorized. . . . (citations omitted).
>
> Carawan, 515 So.2d at 167-68.

In Smith v. State, 430 So.2d 448 (Fla. 1983) this court analyzed the offenses of sale and possession and found that each had an element of proof that the other did not. This holding was not changed by Carawan v. State, 515 So.2d 161 (Fla. 1987) which held only that one could not be convicted of both sale and possession in addition to trafficking. Carawan appears to agree that they are separate offenses. Possession is not required to purchase, and purchase is not required to possess contraband. In Carawan, this court continued to recognized that:

> ". . . sale of drugs can constitute a separate crime from possession. . ."
>
> Id. at 176.

In this case, the offense of delivery, chargeable under §893.13(1)(a), can and does constitute a separate crime from simple possession, an offense chargeable under §893.13(1)(f). This court has always recognized that, simply because one offense may be "comprehended", State v. Anderson, 370 So.2d 353 (Fla. 1973) or "implied" within another, Payne v. State, 275 So.2d 261 (Fla. 4th DCA 1973), does not mean one is a lesser included to

the other, or that the implication makes it a necessary element under §775.021(4), Florida Statutes. As the court in Payne stated:

> "While the state may be correct that an allegation of delivery implies possession or constructive possession, an implied allegation is insufficient to bring a secondary offense within the score of the information where the secondary offense is not a necessarily included offense. Where the secondary offense is necessarily included within the offense charged, the elements of the secondary offense must be specifically alleged -- not implied -- by the accusatory instrument.
>
> Id., at 263.

Furthermore, delivery and possession also remain separate crimes under the statute effective July 1, 1988, for crimes occurring thereafter, because each has an element separate from the other. §775.021(4), Florida Statutes (1988). See also State v. Daophin, 533 So.2d 761 (Fla. 1988) [Simple possession is not a necessarily lesser included offense of trafficking by delivery].

Currently pending before this Honorable Court is the question of whether the double jeopardy clause is violated by virtue of a defendant's conviction for both sale and possession with intent to sell the same drug. State v. Gordon, Fla. S.Ct. #72,850. The State adopts and incorporates by reference the arguments relied upon by the State in Gordon and reasserts those arguments in the instant brief. This court has previously determined that sale and possession are separate offenses. Smith, supra. Accord, Dukes v. State, 464 So.2d 582 (Fla. 2d DCA

1985). Further, in Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1980) the Court specifically stated that possession is not an essential aspect of sale.[1]

Section 775.021(4), Florida Statutes, provides that whoever commits several offenses shall be sentenced separately for each and that offenses are separate if each offense requires proof of an element that the other does not "without regard to the accusatory pleading or the proof adduced at trial." It is not a necessary element of delivery that the state prove possession, See, e.g. Daophin, 533 So.2d at 762.

Separate evils have been addressed in the legislature's proscriptions in 5893.13, Florida Statutes. The statutory provision prohibiting possession of a controlled substance is aimed at punishing the individual posssessor for his criminal activity which does not directly or necessarily involve persons other than the perpetrator. Delivery necessarily includes the involvement of other citizens and the legislature has a legitimate interest in punishing not only those who engage in private, personal illegal conduct, but who also seek to include the participation of others in the society in proscribed conduct.

The legislature may permissibly decide to punish separately those who seek to involve other persons in illegal activity as

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[1] The court in Daudt v. State, 368 So.2d (Fla. 2d DCA 1979), reversed a conviction for possession of marijuana for insufficient evidence, but let stand a conviction for sale of the same marijuana. It is thus clear that a defendant may be guilty of sale without actual or constructive possession.

well as those who individually engage in proscribed conduct. As the United states Supreme Court explained in United States v. Feola, 420 U.S. 671, at 693, 43 L.Ed.2d 541, at 558 (1975), the policy reasons underlying society's separately punishing conspiracy and the substantive offenses, include the protection of society from the dangers of concerted criminal activity and the intervention of the law to stop inchoate crime which has gone beyond preparation.

The rule of lenity

Carawan itself recognized that the rule of lenity was not a principle to override the clear intent of the legislature. Rather:

> "We do not find that these two rules of construction are irreconcilable. Indeed, we believe that each may be accorded a field of operation that harmonizes with the other. . .
>
> * * *
>
> Since actual intent must prevail absent a constitutional violation, the two rules are applicable only when legislative intent is unclear. Moreover, by its own terms, the rule of lenity comes into play only where the statutes in question are susceptible of differing constructions, that is, when legislative intent is equivocal as to the issue of multiple punishments."
>
> (515 So.2d 168)

Section 775.021(4), Florida Statutes (Supp. 1988), as amended, provides:

> §775.021- Rule of Construction --
>
> * * *
>
> (4) (a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Leqislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle to lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are deqrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

The legislature has thus declared that, with three exceptions, the rule of lenity is not to be applied to determine

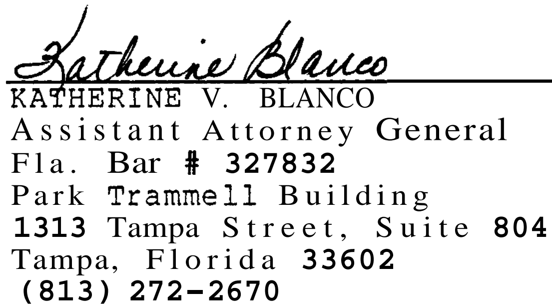
legislative intent if offenses are separate under section 4(a); and none of those three exceptions apply here. The offenses of possession and delivery do not require identical elements of proof, so (4)(b)1 is inapplicable. Nor do the crimes fit the second exception of being offenses which are degrees of the same offense as provided by statute. That leaves the third exception: offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense. The delivery of cocaine, a second degree felony, is the greater offense over possession of cocaine, a third degree felony. However, the statutory elements of possession are not subsumed by the greater offense of delivery of cocaine. Because one need not possess cocaine to deliver it, Daophin, the statutory elements of possession, without regard to the proof thereof, can never be said to be subsumed by the elements of the delivery; and, thus, (4)(b)3 is inapplicable. It is clear that the legislature has always intended that simple possession and delivery constitute two separate offenses, subject to separate convictions and sentences. Carawan did not purport to change this and the legislature has emphatically reaffirmed its original position. Thus, pursuant to section 775.021, in the absence of an exception, a defendant who commits an act which constitutes more than one offense shall, where each offense requires proof of an element that the other does not, be convicted and sentenced for each offense.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Petitioner would ask that this Honorable Court reverse the order of the Second District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Public Defender's Office, Criminal Court Complex, 5100 144th Avenue North, Clearwater, Florida 34620 this 12th day of June, 1989.

OF COUNSEL FOR PETITIONER