

IN THE FLORIDA SUPREME COURT

**FILED**  
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STATE OF FLORIDA,

Petitioner,

v.

Case No. 74,022

[Second District Court #88-3182]  
[Pinellas County #85-12822]

JOSEPH CHARLES SPADARO,

Respondent.

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

**BRIEF OF PETITIONER ON THE MERITS**

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the Appellee in the Florida District Court of Appeal, Second District, and the prosecution in the trial court. Respondent, Joseph C. Spadaro, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. The Appendix to this Brief contains a copy of the decision of the Second District Court of Appeal filed on March 10, 1989 in Spadaro v. State, 539 So.2d 1169 (Fla. 2d DCA 1989).

NOTICE OF RELATED CASES

The following cases raise the same issue presented in the instant brief; i.e. Whether the Florida Supreme Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), which modified the law regarding double jeopardy, applies retroactively in collateral proceedings for post-conviction relief. Glenn v. State, 537 So.2d 611 (Fla. 2d DCA 1988), review granted, No. 73, 496 Fla. May 3, 1989); Jenson v. State, 538 So.2d 540 (Fla. 2d DCA), review granted, No. 73,828 (Fla. June 5, 1989); Merckle v. State, 541 So.2d 1312 (Fla. 2d DCA), review granted, No. 74,106 (Fla. June 30, 1989); Love v. State, 532 So.2d 1133 (Fla. 4th DCA 1988), review granted, No. 73, 401 (Fla. March 17, 1989); Pastor v. State, 536 So.2d 356 (Fla. 3d DCA 1988), review granted, No. 73, 780 (Fla. June 6, 1989); State v. Eltinger, 538 So.2d 1354 (Fla. 2d DCA 1988) [Application for review pending].

STATEMENT OF THE CASE AND FACTS

In 1985, the Respondent/Defendant, Joseph Spadaro, was charged with trafficking in cocaine (§893.135(1)(b), Florida Statutes, a first degree felony); possession of cocaine (§893.13(1)(e), a third degree felony); possession of marijuana (§893.13(1)(e), Florida Statutes, a third degree felony; and possession of paraphernalia (5893.147, a first degree misdemeanor). At Spadaro's change-of-plea hearing on July 23, 1986, the defense stipulated to the following factual basis:

THE COURT: Give me a synopsis, please.

[PROSECTUOR MR. GEESEY]: May it please the Court. The State would show on November 4, 1985, at approximately 10:54 P.M. here in Pinellas County on 58th Avenue South and Third Street South in St. Petersburg, the defendant's vehicle was stopped by the members of the Pinellas County Sheriff's Office pursuant to an investigation they were conducting. The defendant previously had been recorded on tape explaining to the informant, stating that he was going to be bringing cocaine and marijuana into Pinellas County. A search of the vehicle resulted in a seizure of

a trafficking amount of cocaine in the amount in excess fo 400 grams, it being approximately 500 grams of cannabis as well. There was paraphernalia described as a glass bottle and pipe. The defendant post-Miranda requested a lawyer before going into any substance of the case, but at one point he made a spontaneous statement to Officer Joe Brady from the Pinellas County Sheriff's Office. He was bringing the cocaine for a person here in Clearwater and that was the firsttime he had done so, although we have intelligence information that it was not the first time that he has made other trips in the past. Substance did prove positive for a trafficking amount of cocaine. There was another amount of cocaine found in the glass bottle. All these happened in Pinellas County, Florida. (emphasis added) .

THE COURT: Anything you wish to add to that, counsel?

[DEFENSE COUNSEL MR. DELAGRANA] : We will stipulate.

(R. 7-8, Appendix A-2)

On January 8, 1987, Spadaro was sentenced to the mandatory term of 15 years imprisonment on the trafficking charge, concurrent five year terms on the drug possession charges and a concurrent one year term on the misdemeanor conviction. (Appendix A-1).

In 1988, Spadaro filed a Rule 3.850 Motion for Post-Conviction Relief alleging, inter alia, that the trial court violated principles of double jeopardy in convicting and sentencing Spadaro for trafficking in cocaine as well as possession of cocaine, possession of marijuana and paraphernalia. The trial court denied Spadaro's double jeopardy claim, stating:

As to the second allegation, the Defendant alleges that his right to double jeopardy was violated because "the Court erred when it imposed a illegal sentence for the Counts of Possession of Cocaine Mariquana [sic] and Drug Paraphernalia [sic]". This ground is without merit because possession and sale of cocaine are not lesser included offenses of trafficking in cocaine and the Defendant, therefore, can properly convicted of and punished for all three. Rotenberry v. State, 468 So.2d 971 (Fla. 1985).

This court is cognizant of the Florida Supreme Court's recent decision in Carawan v. State, 515 So2.d 161 (Fla. 1987) upon which the Defendant relies in support of his double jeopardy argument. Nevertheless, the Defendant's reliance is misplaced because Carawan "was not specifically retroactive to prior convictions." Clark v. State, 13 FLW 2098 (Fla. 5th DCA September 8, 1988). The Defendant committed the crimes of which he was convicted on November 8, 1985 and sentence was imposed on January 8, 1987. (See Exhibit III

attached). Accordingly, the Defendant's right against double jeopardy has not been violated.

(Appendix A-2).

On appeal from the denial of Spadaro's Rule 3.850 Motion, the Second District Court found that the trial court erred in summarily denying the defendant's double jeopardy claim and held that the decision of Carawan v. State, 515 So.2d 161 (Fla. 1987) was to be retroactively applied to convictions which were obtained prior to the rendition of Carawan. The opinion of the Second District Court states:

Joseph Charles Spadaro timely appeals the summary denial of his post-conviction relief motion filed pursuant to Florida Rule of Criminal Procedure 3.850. We previously reviewed the circuit court's summary denial of Spadaro's motion and affirmed in part and reversed in part. Spadaro v. State, No. 88-1083 (Fla. 2d DCA, Aug. 5, 1988). On remand, the court again summarily denied the motion and provided attachments from the record in support of a portion of the ruling. We again affirm in part and reverse in part.

We agree with the trial court that Spadaro's claim of an involuntary plea is adequately refuted by the record and transcript. That portion of the order is affirmed.

However, we reverse the denial of Spadaro's allegation that he was sentenced in violation of double jeopardy prohibitions for trafficking in cocaine and possession of cocaine. Carawan v. State, 515 So.2d 161 (Fla. 1987). Subsequent to the circuit court's determination to the contrary, this court held that Carawan is retroactively applicable to convictions which were obtained prior to the opinion's rendition. Glenn v.

State, No. 88-1256 (Fla. 2d DCA Nov. 30, 1988)  
[13 F.L.W. 2622]; Gonzales-Osorio v. State,  
535 So.2d 644 (Fla. 1st DCA 1988). Contra  
Harris v. State, 520 So.2d 639 (Fla. 1st DCA),  
review denied, No. 71,999 (Fla. Oct. 12, 1988)  
(reaching a contrary holding).

Accordingly, we find that the trial court erred in summarily denying Spadaro's double jeopardy contention. We reverse this part of the summary denial with directions that the trial judge examine the files and records in this case to determine whether they conclusively refute Spadaro's double jeopardy argument. If *so*, the court should attach such documentation to its order. Otherwise, an evidentiary hearing may be necessary to resolve the question. If the record actually supports Spadaro's argument, the court should vacate the judgment and sentence for possession of cocaine. Any party aggrieved by the subsequent action of the trial court must file a notice of appeal within thirty days to obtain further appellate review.

14 F.L.W. 657-658.

On August 8, 1989, this Honorable Court accepted jurisdiction to review the decision of the Second District Court of Appeal.

SUMMARY OF THE ARGUMENT

The purpose of a Rule 3.850 Motion for Post-Conviction Relief is to provide for inquiry into the alleged constitutional infirmity of a judgment and sentence. Carawan, which was decided in 1987, was not the law at the time of the defendant's convictions and is not the law now. The fact that the Carawan decision was not a development of fundamental significance is conclusively demonstrated by the fact that it was immediately repudiated by the legislature in the very next legislative session following the court's decision. Carawan did not represent a fundamental change in the law requiring retroactive application in collateral proceedings.

ARGUMENT

ISSUE

CARAWAN-BASED DOUBLE JEOPARDY CLAIMS MAY NOT  
BE RAISED VIA RULE 3.850 MOTIONS FOR POST-  
CONVICTION RELIEF.

The purpose of a 3.850 motion is to provide for inquiry into the alleged constitutional infirmity of a judgment or sentence. McCrae v. State, 437 So.2d 1388 (Fla. 1983). A 3.850 motion cannot be utilized for a second appeal to consider issues that either were raised or could have been raised in the initial appeal. Herring v. State, 501 So.2d 1279 (Fla. 1986); Sireci v. State, 469 So.2d 119 (Fla. 1985); Jones v. State, 446 So.2d 1059 (Fla. 1984). Matters that could have been remedied by objection at trial and argument on appeal may not be considered by means of a Rule 3.850 motion. Straight v. State, 488 So.2d 530 (Fla. 1986) .

The Defendant's reliance on Carawan v. State, 515 So.2d 161 (Fla. 1987) as a basis for his collateral attack of his convictions is misplaced. Carawan was not the law at the time of defendant's convictions and is not the law now. Spadaro's offenses were committed in 1985; his change-of-plea hearing was held in 1986, and he was sentenced in January of 1987. At the change-of-plea hearing, the defense stipulated to the factual basis which evidenced that two separate identifiable quantities of cocaine supported the dual charges. Accordingly, even if the defendant were arguably entitled to raise a Carawan-based double

jeopardy claim in a post-conviction proceeding, the stipulated factual basis ~~at bar~~ precludes relief. See, e.g. Newsome v. State, 543 So.2d 465 (Fla. 2d DCA 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 remainder in his possession.] Bello v. State, 14 FLW. 339 (Fla. Case No. 70,552, Opinion filed July 6, 1989) [Separate convictions and sentences for delivery and possession of same marijuana did not violate double jeopardy clause where evidence showed that, in addition to drugs delivered to undercover officer, the defendant possessed at least one other container of drugs. 14 FLW. 341]; Smith v. State, 430 So.2d 448 (Fla. 1983) [Applying §775.021(4) and Blockburger, this court determined that possession of a controlled substance in violation of 8893.13 (1)(e), Florida Statutes, was not an offense included in the sale of a controlled substance proscribed by §893.13(1)(a).] See also, Portee v. State, 447 So.2d 219 (Fla. 1984) [Following Smith, defendant properly convicted and sentenced for sale and possession of more than five grams of marijuana]; State v. Daophin, 533 So.2d 761 (Fla. 1988) [Simple possession is not a necessarily lesser included offense of trafficking by delivery.) Carawan concluded only that one could not be convicted of both sale and possession in addition to trafficking .

In response to Carawan, the legislature specifically amended Section 775.021(4) to approve multiple convictions for crimes arising out of a "single evil". Clark v. State, 530 So.2d 519 (Fla. 5th DCA 1988). Nothing in Carawan makes it applicable to this case because it was not specifically retroactive to prior convictions. Id. at 520. Most recently, in State v. Smith, et. al., \_\_\_\_\_ So.2d \_\_\_\_\_, 14 F.L.W. 308 (Fla. Case Nos. 72,633 and 72,850, Opinion filed June 22, 1989), this court confirmed that Carawan was grounded on the Court's interpretation of legislative intent in enacting §§775.021(1) and (4), Florida Statutes and held that Carawan has been overridden for offenses which occur after the effective date of Chapter 88-131, section 7.<sup>1</sup>

The non-retroactivity of Carawan to a defendant's convictions is comparable to appellate decisions determining the non-retroactivity of Hall v. State, 517 So.2d 678 (Fla. 1988), which held that the legislature did not intend dual punishments for a single criminal act of displaying a firearm and of committing a robbery while armed. In Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988), review denied, 536 So.2d 244 (Fla. 1988)

<sup>1</sup> In Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), approved State v. Smith, 14 F.L.W. 308, the Second District Court stated at 911, note 2:

It is important to note that the appellant did not possess more than this one cocaine rock. Possessing other rocks that he chose not to sell in this instant act of sale but which he kept in his possession for later possible use or sale would be a separate act for which he could be separately convicted and punished. See discussion infra p. 914.

the Court held that a defendant was not entitled to post-conviction relief based on Hall for his dual convictions. The Court stated, at page 640:

"We do not discern anything in Hall, at 679, that would make that decision apply retroactively or provide that such dual convictions now constitute fundamental error under the reasoning in Witt v. State, 387 So.2d 922 (Fla.) cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed. 612 (1980). Appellant's sentence was not illegal when imposed, as construed under Bass, as the supreme court had already decided such dual convictions were permissible in Gibson, 452 So.2d at 553. We therefore find that appellant is not entitled to post-conviction relief on this ground and AFFIRM the denial of the motion. . . ."

520 So.2d at 640, Accord  
Love v. State, 532 So.2d  
1133 (Fla. 4th DCA 1988)  
review granted, No. 73,401  
(Fla. March 17, 1989).

In Witt v. State, 387 So.2d 922 (Fla. 1980), cert. den. 449 U.S. 1067 (1980), the Supreme Court of Florida rejected, in the context of an alleged change of law, the use of post-conviction relief proceedings to correct individual miscarriages of justice or to permit roving judicial error corrections, in the absence of fundamental and constitutional law changes which cast serious doubt on the veracity or integrity of the original trial proceeding. In Witt, a capital case, the Court held that an alleged change of law will not be considered under Rule 3.850 unless the change (1) emanates from the Supreme Court of Florida or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental

significance. See also, Henderson v. Dugger, 522 So.2d 835 (Fla. 1988); McCuiston v. State, 534 So.2d 144 (Fla. 1988) [Whitehead v. State, 498 So.2d 863 (Fla. 1986) which determined that a defendant's habitual offender status is not a legally sufficient reason for departure from the guidelines, does not apply retroactively in post-conviction proceedings.]

While Carawan emanated from this Court, it is neither constitutional in nature nor of fundamental significance. The language of Carawan is grounded in a statutory construction analysis, balancing the dictates of Section 775.021(4) with the lenity provision. Statutory construction, while it may have some constitutional trappings, as does any matter brought before a court, is not fundamentally a constitutional issue. Although the stipulated factual basis presented in this case would preclude relief on the merits of the defendant's post-conviction claim, Carawan is not a major constitutional change nor development of fundamental significance under Witt which requires retroactive application. To the contrary, Carawan was merely a brief evolutionary decision on legislative intent concerning the issue of multiple punishments. **As** a result of the Carawan decision in 1987, the legislature promptly amended Section 775.021(4), Florida Statutes, to make clear its intent to permit multiple convictions for crimes arising out of a "single evil". Chapter 88-131 section 7, Laws of Florida (1988); Clark, supra. The fact that the Carawan decision was not a development of fundamental significance is conclusively demonstrated by the evidence that it was immediately repudiated by the legislature in the very next

legislative session following the Court's decision. Thus, it is clear that Florida's legislature intends, and previously intended, that separate offenses, as defined by the state legislature, are subject to separate convictions and sentences. As this Court stated in Witt, supra, at pages 928-929:

" . . . To allow non-constitutional claims as bases for post-conviction relief is to permit a dual system of trial and appeal, the first being tentative and nonconclusive. Our justice system could not accomodate such an expansion; our citizens would never tolerate the deleterious consequences for criminal punishment, deterrence and rehabilitation. . . . "

Carawan is not a fundamental change in the interpretation of law **so** as to require its retroactive application. There are three essential considerations in determining whether a new rule of law is so fundamental it must be applied retroactively. Witt, 387 So.2d at 926. These considerations are: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule. Witt v. State, supra.

Nevertheless, all constitutional rights affected by changes in the law are not fundamental: Compare Williams v. State, 363 So.2d 331 (Fla. 1978). Only those which are major constitutional changes of law resulting in fundamentally significant developments may be raised initially on a motion for post conviction relief. State v. Washington, 453 So.2d 389 (Fla. 1984). State v. Austin, 532 So.2d 19 (Fla. 5th DCA 1988).

While the purpose behind the new rule of law set forth in Carawan is to prevent perceived double jeopardy violations for

crimes occurring out of a single evil, it is clear that prior to Hall all cases based on similar facts are decided pursuant to Gibson. Retroactive application would vastly increase the already overwhelming burden on the judicial system. Had this Court chosen to, it could have, either with its decision in Carawan or thereafter, chosen to apply Carawan retroactively. It is thus apparent that Carawan does not reach the level of a fundamental change in the law so as to require its retroactive application. This is particularly true in view of the legislature's immediate amendment to F.S. 775.021 which served to clarify its intention to allow separate convictions.

The purpose of Carawan was to balance potentially conflicting rules of construction, so that the courts may determine legislative intent regarding similar crimes. The old rule of law was heavily relied upon, and the law of multiple offenses went through various transformations during most of this decade. The grounds upon which the defendant's 3.850 motion was based, multiple punishments arising out of a single act, were never raised on appeal by the defendant but could indeed have been presented. Additionally, the change of law represented by Carawan is not now the law and was not the law at the time of defendant's conviction and initial appeal. Further, Carawan is not retroactive and it would be a miscarriage of justice to apply the brief, non-fundamental change of law to this defendant's criminal convictions and sentences. The finality of decisions in many cases would be brought into doubt, forcing the courts to reconstruct the underlying facts of particular offenses many

years later in order to address the merits of the defendant's claim on collateral review. Finally, the state would urge that relief is inappropriate in the instant case for a more fundamental reason. Smith, supra, makes it abundantly clear that Carawan has been overridden and the legislature intended that separate punishments be imposed and that the law in effect at the time of commission of a crime controls as to the offenses for which the perpetrator can be convicted as well as the punishments which may be imposed.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, the decision in Carawan should not be applied retroactively in post-conviction proceedings.

Respectfully submitted

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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 JOSEPH C. SPADARO, #105825, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glades, Florida this 5th day of September, 1989.

*K. Blanco*  
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