

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,038

THE STATE OF FLORIDA,

Petitioner,

-vs-

TROY MARTIN a/k/a  
TYRONE WILLIAMS,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW  
FROM THE DISTRICT COURT OF APPEAL OF  
FLORIDA, THIRD DISTRICT

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BRIEF OF RESPONDENT ON THE MERITS

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BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

This is an appeal by the State of Florida following a certified conflict by the Third District Court of Appeal with the First District's decision in Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989). In this brief, the symbol "R" will be used to designate the record on appeal, and the symbol "T" will be used to designate the transcripts of proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Facts and Case as a generally accurate account of the facts of the crime and the lower court proceedings. Because resolution of the issue of whether dual convictions for first degree murder and possession of a firearm in the commission of a felony are proper is not specifically influenced by the facts of the case, any discrepancy with the Statement of the Facts will not be addressed.

QUESTION PRESENTED

THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT DUAL CONVICTONS FOR FIRST DEGREE MURDER WITH A FIREARM AND POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY VIOLATE THE PROHIBITON AGAINST DOUBLE JEOPARDY GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION.

### SUMMARY OF THE ARGUMENT

In Hall v. State, 517 So.2d 678 (Fla. 1988) this Court clearly enunciated the principle that once the use of a firearm has been used to enhance an offense, a defendant cannot simultaneously be convicted of an additional offense which punishes possession of the same firearm. In its decisions prohibiting dual convictions for first degree murder with a firearm and possession of a firearm during the commission of a felony, the Third District Court of Appeal has recognized that the offense of first degree murder with a firearm is enhanced by virtue of the defendant's use of a firearm during the murder.

Section 775.987(2) Florida Statutes (1989) requires the imposition of a three year minimum mandatory sentence to a selected number of felonies when a firearm is used. Murder is among the enumerated felonies. By imposing a mandatory sentence in accord with Section 775.087(2), the "evil" of using a firearm during the murder, is punished. Thus allowing an additional conviction for possession of the firearm is duplicitous and violative of the double jeopardy prohibitions in the state and federal constitutions.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL PROPERLY HELD THAT DUAL CONVICTIONS FOR FIRST DEGREE MURDER WITH A FIREARM AND POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION

In Hall v. State, 517 So.2d 678 (Fla. 1988), this Court held that dual convictions for armed robbery and possession of a firearm in the commission of a felony violated the prohibition against double jeopardy contained in the federal and state constitutions. The Court based its ruling on the acknowledgment that robbery is enhanced by virtue of the use of a firearm. Thus allowing an additional conviction for possession of the firearm would permit double enhancement for carrying or displaying the same weapon:

We hold the legislature had no intent of punishing a defendant twice for the single act of displaying a firearm or carrying a firearm while committing a robbery. To hold otherwise would mean that, for every offense of robbery in which a defendant uses or carries or displays a firearm, in violation of section 812.13, there would also be a violation of section 790.02(2). Robbery, under section 812.13(1), becomes the enhanced offense of armed robbery under 812.13(2)(a) by reason of the element of carrying or displaying a firearm. Interpreting the statutes according to the state would mean the offense is enhanced twice for carrying or displaying the same weapon. It is unreasonable to presume the legislature intended this result. In accordance with Carawan, we find this would constitute a dual punishment for one single act, and would be contrary to the legislative intent under the principles set forth in our holdings in Carawan, Mills, Houser, and Boivin.

Hall v. State, supra, at 680.

Decisions since Hall have consistently prohibited convictions for the use of a firearm during the commission of a felony where the defendant is simultaneously convicted of an offense which has been enhanced as a result of the same firearm. Gibson v. State, 568 So.2d 977 (Fla. 1st DCA 1990) (dual convictions for use of a firearm during the commission of an offense and second degree murder improper where second degree murder was enhanced as a result of the use of the firearm); Perez v. State, 528 So.2d 129 (Fla. 3d DCA 1988) (dual convictions for possession of a firearm in the commission of an offense and attempted first degree murder improper where attempted murder charge was reclassified as a result of possession of firearm); McKinnon v. State, 523 So.2d 1238 (Fla. 1st DCA 1988) (dual convictions for possession of a firearm and manslaughter improper where manslaughter reclassified as a result of the use of a firearm). Accord, Catlett v. State, 567 So.2d 1069 (Fla. 3d DCA 1990), Cox v. State, 552 So.2d 343 (Fla. 5th DCA 1989); Joseph v. State, 547 So.2d 249 (Fla. 3d DCA 1989); Jones v. State, 546 So.2d 126 (Fla. 3d DCA 1989); Curry v. State, 539 So.2d 573 (Fla. 5th DCA 1989); Burgess v. State, 524 So.2d 1132 (Fla. 1st DCA 1988).

Thus it is clear that once the use of a firearm has been used to enhance an offense, a defendant cannot simultaneously be convicted of an additional offense which punishes possession of that same firearm. In its decisions prohibiting dual convictions for first degree murder with a firearm and possession of a

firearm during the commission of a felony, the Third District Court of Appeal has acknowledged that the offense of first degree murder with a firearm is enhanced by virtue of the defendant's use of the firearm during the murder.

Section 775.087(2) Florida Statutes (1989) requires the imposition of a three year minimum mandatory sentence to a selected list of felonies when a firearm is used in the commission of the offense. Murder is among one of the enumerated felonies listed in Section 775.087(2) Florida Statutes (1989).<sup>1</sup> The trial judge does not have discretion to decide whether to enhance the defendant's sentence by virtue of the provisions of Section 775.087(2). Haywood v. State, 466 So.2d 424, 425 (Fla. 4th DCA 1984), approved, 482 So.2d 1377. Thus Section 775.087(2) provides an enhancement by virtue of the fact that a firearm was used. To allow an an additional conviction for possession of the same firearm would permit double enhancement for carrying or

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<sup>1</sup> Section 775.087(2):

Any person who is convicted of:

(a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crime; or

(b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.275, prior to serving such minimum sentence.

displaying the same weapon.

Although this Court approved of State v. Baker, 456 So.2d 419 (Fla. 1984) in Carawan v. State, 515 So.2d 161 (Fla. 1987), review of this issue is not foreclosed. State v. Baker, supra, upheld dual convictions for first degree murder and possession of a firearm during the commission of a felony. In Carawan, the Court approved of Baker by reasoning that first degree murder and possession of a firearm during the commission of a felony did not share the same elements and addressed separate "evils." Carawan v. State, supra, at 169. In reaching this conclusion however, the Court did not address the enhancement provision of Section 775.087(2).

By imposing a mandatory sentence in accord with Section 775.087(2), the "evil" of using a firearm during the murder is punished. Thus allowing an additional conviction for possession of the firearm is duplicitous and violates the prohibition against double jeopardy guaranteed by the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution. The enhancement provision of Section 775.087(2) was similarly not addressed by the First District in Harper v. State, 537 So.2d 1131 (Fla. 1st DCA 1989). The Third District Court of Appeal's holding in the instant case, prohibiting dual punishments for first degree murder with a firearm and possession of a firearm during the commission of a felony should therefore be upheld.

CONCLUSION

Based on the foregoing facts, authorities and arguments, respondent respectfully requests this Court to affirm the Third District Court of Appeal's decision disallowing dual convictions for first degree murder and possession of a firearm in the commission of a felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 N.W. Second Avenue, Miami, Florida 33128, this 28th day of January, 1991.

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