

IN THE SUPREME COURT OF FLORIDA

REGINALD THOMAS,

Petitioner,

v.

CASE NO. SC11-1255

STATE OF FLORIDA,

DCA No. 1D09-572

Respondent.

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Did the First District Court of Appeal misapply State v. McCloud, 577 So. 2d 939 (Fla. 1991), as authority to reject a double jeopardy challenge to convictions of both possession of cocaine with intent to sell and sale of cocaine based on the possession and sale of a single rock of cocaine?

The Court should exercise its discretion to review a decision that, in petitioner's view, overextends McCloud on the validity of multiple convictions for a single offense defined by statute.

STATEMENT OF THE CASE AND FACTS

Thomas was convicted of sale of cocaine within 1,000 feet of a school and possession of cocaine within 1,000 feet of a school with intent to sell. Both convictions “involved the same quantum” of cocaine. Thomas v. State, 36 Fla. L. Weekly D786a (1st DCA April 14, 2011). Thomas argued on direct appeal that the multiple convictions are degrees of the same offense for which multiple convictions are unauthorized under section 775.021(4), Florida Statutes. The state agreed. Nonetheless, the First District affirmed in reliance on State v. McCloud, 577 So. 2d 939 (Fla. 1st DCA 1991). The First District noted that McCloud was convicted of sale and simple possession (that is, without intent to sell) of a single quantum of cocaine. The court continued:

But, when the Florida Supreme Court reviewed the case upon certification of a question of great public importance, that question was phrased broadly, to wit:

When a double jeopardy violation is alleged based on the crimes of sale and possession (or possession with intent to sell) of the same quantum of contraband and the crimes occurred after the effective date of section 775.021, Florida Statutes (Supp. 1988), is it improper to convict and sentence for both crimes?

We answer the question in the negative and approve in part and quash in part the decision of the Second District.

Thomas, 36 Fla. L. Weekly at D787, quoting McCloud, 577 So. 2d at 939-40 (footnote omitted).

Although McCloud's holding is limited to its facts, which involves a conviction of simple possession of cocaine, the First District in this case extended McCloud to also cover dual convictions of possession with intent and sale. Petitioner seeks discretionary review on grounds that the First District overextended and thereby misapplied McCloud.

SUMMARY OF THE ARGUMENT

The First District misapplied the holding in McCloud by extending it to the answer to the certified question, which overreached its facts. As noted by the First District in this case, this Court in McCloud answered a certified question that encompassed the crime of possession with intent to sell although McCloud himself was convicted of simple possession.

The First District decision is one of several misapplying McCloud's holding to affirm convictions of sale and possession with intent to sell a single quantum of cocaine. This misapplication ignores the status of these two acts as alternative elements of a single offense for which multiple convictions are unauthorized under subsection 775.021(4), Florida Statutes. Because of the difference between the answer to the certified question and the holding in McCloud, this misapplication will continue until resolved by this Court.

If this Court grants review, petitioner will argue that sale and possession with intent to sell a rock of cocaine are not “an act or acts which constitute one or more separate criminal offenses” under subsection 775.021(4). Instead, these acts are alternatives of a single element defined in subsection 893.13(1)(a), for which dual convictions are unauthorized.

ARGUMENT

THIS COURT SHOULD ADDRESS THE FIRST DISTRICT'S MISAPPLICATION OF MCCLOUD TO CONVICTIONS FOR BOTH SELLING AND POSSESSING WITH INTENT TO SELL A SINGLE QUANTUM OF COCAINE, A SCENARIO OUTSIDE MCCLOUD'S FACTS AND THEREFORE ITS HOLDING.

This Court's discretion to review district court decisions that expressly and directly conflict with this Court's decisions encompasses misapplication of its precedent. See Jaimes v. State, 51 So. 3d 445, 446 (Fla. 2010); Wallace v. Dean, 3 So. 3d 1035, 1040 (Fla. 2009). The First District in this case misapplied the holding in State v. McCloud, 577 So. 2d 939 (Fla. 1991), by extending it to this Court's answer to the question certified in McCloud, which overreached its facts. As noted by the First District, this Court in McCloud answered a certified question that, as phrased, involved the crime of possession with intent to sell although McCloud himself was convicted of simple possession.

How did this occur? The certified question was a holdover from a case in which it fit the facts: Gordon v. State, 538 So. 2d 910 (Fla. 2d DCA 1988), approved, State v. Smith, 547 So. 2d 613 (Fla. 1989). There the Court addressed a question certified by the Second District asking whether, under Carawan v. State, 515 So. 2d 161 (Fla. 1987), "dual convictions for the crimes of sale of one rock of cocaine and possession with intent to sell that same rock" constitute double jeopardy." This Court said yes, but not for crimes after the effective date of an

amendment to subsection 775.021(4), Florida Statutes abrogating Carawan. Smith, 547 So. 2d at 617.

The Second District certified essentially the question as in Gordon/Smith for crimes committed after the effective date of the amendment in V.A.A. v. State, 561 So. 2d 314, 315 (Fla. 2d DCA 1990), and again in McCloud, although both cases involved convictions of sale and simple possession, not possession with intent. This Court decided McCloud first, then decided V.A.A. in accord with McCloud. See V.A.A. v. State, 577 So. 2d 941 (Fla. 1991).

In following McCloud's answer to the certified question, the First District in this case misapplied McCloud's holding. "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." Michael Abramowicz and Maxwell Stearns, Defining Dicta, 57 Stan. L.Rev. 953, 1064 (2005), quoted in State v. Yule, 905 So. 2d 251, 259 n.10 (Fla. 2d DCA 2005). This Court's rejection of a double jeopardy challenge constitutes a holding only as to the crimes at issue in that case, sale and simple possession.

To the extent that the Court's answer to the certified question in McCloud also encompassed possession with intent to sell, it was dicta. The First District's reliance on that dicta in this case to reject a double jeopardy challenge to dual

convictions of sale and possession with intent to sell misapplied McCloud's holding. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend.").

The difference between simple possession and possession with intent to sell is important both in the offenses' penalties and in their statutory relationships to sale of cocaine. Sale and simple possession of cocaine appear in different provisions, subsections 893.13(1)(a) and 893.13(6)(a), Florida Statutes (2006). Sale is a second-degree felony, simple possession a third-degree felony. In contrast, sale and possession with intent are second degree felonies which appear as alternative elements in the same subsection, 893.13(1)(a): "[i]t is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." Both acts are first-degree felonies when committed within 1,000 feet of a school, as in this case. § 893.13(3)(a), Fla. Stat. (2006).

For reasons inapplicable to sale and simple possession, the act of personally selling a piece of cocaine arguably constitutes a single statutory offense of sale of, or possession with intent to sell, cocaine. Section 775.021(4)(a), Florida Statutes, provides that one who, during a single episode, "commits an act or acts which constitute one or more separate criminal offenses" shall receive separate, perhaps consecutive sentences for each offense. Offenses are separate under the provision

only “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.”

If granted an opportunity to brief this case on the merits, petitioner will argue that the sale and possession with intent to sell a rock of cocaine are not “an act or acts which constitute one or more separate criminal offenses” under subsection 775.021(4), Florida Statutes. Instead, these acts are alternatives of a single element under subsection 893.13(1)(a), for which dual convictions and sentences are not authorized.

The First District decision in this case is one of several misapplying McCloud’s holding to affirm convictions of sale and possession with intent to sell a single quantum of cocaine. See Seward v. State, 937 So. 2d 767, 768 (Fla. 5th DCA 2006); McMullen v. State, 876 So. 2d 589, 590 (Fla. 5th DCA 2004). This misapplication ignores the status of these two acts as alternative elements of a single offense for which multiple convictions are unauthorized under subsection 775.021(4). Because of the disconnection between the answer to the certified question and the holding in McCloud, this misapplication will continue until resolved by this Court. Petitioner welcomes the opportunity to assist.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Court grant discretionary review.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Joshua R. Heller, Office of the Attorney General, the Capitol, PL-01, Tallahassee, FL 32399-1050, this ____ day of July, 2011. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,

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