

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

LESLIE G. KISS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-5057

[July 7, 2010]

HAZOURI, J.

The state charged Leslie Kiss with three counts of dealing in stolen property and one count of grand theft of the same property. The charges of grand theft and dealing in stolen property were in connection with one scheme or course of conduct and, pursuant to section 812.025, Florida Statutes (2007), the state chose to charge Kiss in a single information. Section 812.025 provides:

Notwithstanding any other provision of law, a single indictment or information may, under proper circumstances, charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts that may be consolidated for trial, but the trier of fact may return a guilty verdict on one or the other, but not both, of the counts.

The parties do not dispute that the charges of dealing in stolen property and grand theft were in connection with one scheme or course of conduct.

The case was tried before a jury and the state presented evidence sufficient to convict Kiss of dealing in stolen property or grand theft. The jury returned a verdict finding Kiss guilty on all four counts.

Kiss appeals, asserting that the trial court committed fundamental error by failing to instruct the jury—pursuant to section 812.025—that it could return a guilty verdict on one or the other of the charges, but not

both. Kiss further asserts that the trial court did not properly cure this error by adjudicating him guilty on the counts for dealing in stolen property and discharging him as to the count for grand theft. Rather, he contends that he is entitled to a new trial. We agree, and reverse and remand for a new trial.

We are once again faced with the conundrum created by the application of section 812.025. As Judge Klein noted in his special concurring opinion in *Anderson v. State*, 2 So. 3d 303 (Fla. 4th DCA 2008):

This statute, which has been in effect for decades, and is not difficult to apply, continues to generate appeals. The error resulting from it being ignored in the trial court can be raised for the first time on appeal, because it is considered fundamental.

. . . .

. . . If the jury had followed the statute, and was required to choose, it might well have returned a verdict only on the theft charge. The failure to charge the jury on this statute thus puts a defendant at a disadvantage.

Id. at 304. As this court noted in *Aversano v. State*, 966 So. 2d 493 (Fla. 4th DCA 2007), the Florida Supreme Court, in construing the application of section 812.025, stated:

“Section 812.025 allows the State to charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use . . . or whether the defendant traffics or endeavors to traffic in the stolen property. *The linchpin of section 812.025 is the defendant's intended use of the stolen property. The legislative scheme allows this element to be developed at trial and it is upon this evidence that the trier of fact may find the defendant guilty of one or the other offense, but not both.*”

Id. at 496 (quoting *Hall v. State*, 826 So. 2d 268, 271 (Fla. 2002)) (emphasis added). As we further noted in *Aversano*, although counsel for

the defendant did not request a jury instruction on section 812.025, it was fundamental error not to so instruct the jury. *Id.*

The state asserts there is no error, as the trial court struck the charge of grand theft and sentenced Kiss only on the dealing in stolen property counts. The supreme court's decision in *Hall*, and the plain meaning of section 812.025, makes it clear that the state is not entitled to have the jury convict Kiss of both dealing in stolen property and grand theft. The statute does not permit this option. To conclude otherwise would make the language of the statute meaningless.

When engaging in statutory construction,

[i]t is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. Thus, to determine the meaning of a statute, we first look to its plain language. When the statute is clear and unambiguous, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1082 (Fla. 2009) (citations omitted) (internal quotation marks omitted). There is no ambiguity in section 812.025, as that section's statutory language is clear.

There are numerous cases from the district courts that have concluded that the cure to this anomaly of permitting a jury to return a verdict for both dealing in stolen property and grand theft is to strike the lesser of the two offenses. A review of these cases shows that there is no analysis given to support this remedy. The source of this misconception resides in the Fifth District Court of Appeal's decision in *Ridley v. State*, 407 So. 2d 1000 (Fla. 5th DCA 1981), which is the cited authority for this supposed cure.

Ridley was charged with trafficking in stolen property and grand theft, arising out of one scheme or transaction pursuant to section 812.025, Florida Statutes (1979). The court in *Ridley* noted that section 812.025 "prohibits a guilty verdict on both counts charging these two statutory offenses as to the same property." *Id.* at 1002. It further noted that while the State was not required to elect between these counts, section 812.025 requires that the trial court should have instructed the jury that guilty verdicts could not be returned as to both counts. Because this was not done, the district court felt compelled to relieve Ridley of one of

the two convictions. In doing so, the district court noted that

we find no law exactly in point indicating which of the two convictions and sentences should be reversed and vacated. Since we uphold appellant's conviction of burglary as based on the inference that he committed the theft, which in turn is based on the inference arising from his possession of recently stolen property, it is somewhat illogical to uphold the conviction of burglary and void the conviction of the theft upon which it is based.

Id. (emphasis added).

At this juncture, the Fifth District mistakenly analogized this situation to one involving double jeopardy, although recognizing that it is not directly applicable.

Cases involving the voiding of one of two convictions because of double jeopardy concepts and cases under the now repealed "single transaction rule" are not directly applicable. However, since dealing in stolen property is a felony of the second degree, and grand theft of the second degree is but a felony of the third degree, and the State has convinced the jury beyond a reasonable doubt as to both, we reverse the less serious conviction.

Id. (footnote omitted) (citations omitted).

Charging a defendant with dealing in stolen property and grand theft does not involve the issue of double jeopardy. If this were so, then the Fifth District would have been correct in its supposition that an appellate court, when faced with dual jury verdicts for dealing in stolen property and grand theft, should reverse the lesser offense conviction and affirm the greater. See *Pizzo v. State*, 945 So. 2d 1203, 1206 (Fla. 2006) (stating that when an appellate court determines that dual convictions are impermissible because they violate double jeopardy, "the appellate court should reverse the lesser offense conviction and affirm the greater"). However, dealing in stolen property and grand theft each has an essential element that the other lacks. See §§ 812.019, .014, Fla. Stat. (2007). Thus, a conviction for both survives the *Blockburger* test and does not violate double jeopardy. See *Blockburger v. United States*, 284 U.S. 299 (1932).

As noted by Judge Klein in *Anderson*, 2 So. 3d at 304, failure to instruct the jury on section 812.025 puts the defendant at a disadvantage. That disadvantage exists in the instant case. In choosing to sentence Kiss on the dealing in stolen property charges, the trial court imposed a sentence of three and one-half years in prison, followed by five years probation. Had the jury found Kiss guilty of only grand theft, the maximum sentence could not exceed five years. See § 775.082(3)(d), Fla. Stat. (2007). As noted above, the state is free to charge both offenses, but the trier of fact must choose one or the other—but not both.

We, therefore, reverse and remand for a new trial, and we certify conflict with *Ridley* and its progenies.

Reversed and Remanded for New Trial.

STEVENSON, J., concurs.

GERBER, J., concurs specially with opinion.

GERBER, J., concurring specially.

Judge Klein completed his concurring opinion in *Anderson v. State*, 2 So. 3d 303 (Fla. 4th DCA 2008), with the following recommendation:

We need a standard jury instruction to implement the statute, perhaps because, as one writer suggests, “the vast majority of criminal defense attorneys are oblivious” to section 812.025. George C. Via, *Dealing in Stolen Property, Grand Theft, and Ineffective Assistance of Counsel*, Fla. Bar Journal Vol. 82, No. 3 (March 2008). Mr. Via’s main point is that defense counsel who, in ignorance of the statute, allow clients to plead guilty to both theft and dealing in stolen property, are committing malpractice. *I respectfully suggest that our committee on standard jury instructions in criminal cases consider an instruction based on section 812.025.*

Anderson, 2 So. 3d at 304-05 (emphasis added).

Since *Anderson*’s issuance, the committee on standard jury instructions in criminal cases has not proposed an instruction based on section 812.025. Nor are we aware of whether the committee has considered such an instruction.

I echo Judge Klein’s concern that section 812.025 continues to generate appeals and must be addressed to prevent further appeals.

However, I respectfully disagree with the form of his recommendation. An instruction based on section 812.025 presumably would tell the jury: “You may return a guilty verdict on either dealing in stolen property or grand theft, but not both.” How would a jury choose between the two if the state proves the elements of both crimes? I can foresee juries asking that question time and time again. The response should not be “[D]etermine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use . . . or whether the defendant traffics or endeavors to traffic in stolen property,” though such a response would be legally accurate. *Hall v. State*, 826 So. 2d 268, 271 (Fla. 2002).

I think the solution already exists in standard jury instruction 14.2, entitled “Dealing in Stolen Property (Fencing) § 812.019(1).” That instruction shows, as a lesser included offense, “grand theft – third degree” as codified in section 812.014(2)(c), Florida Statutes. If I were the trial court, I would follow standard jury instruction 14.2 and instruct the jury on dealing in stolen property, with grand theft as the lesser included offense. Such an approach would comply with section 812.025, which states that separate counts for dealing in stolen property and theft in connection with one scheme or course of conduct “may” be consolidated for trial.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dale C. Cohen, Judge; L.T. Case No. 08-178 CF10A.

Carey Haughwout, Public Defender, and Paul E. Petillo and Narine N. Austin, Assistant Public Defenders, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Sue-Ellen Kenny, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.