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Criminal Law: Cumulative Sentencing for Offenses Within a Single Transaction

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CRIMINAL LAW: CUMULATIVE SENTENCING FOR OFFENSES WITHIN A SINGLE TRANSACTION

Edmond v. State, 280 So. 2d 449 (2d D.C.A. Fla. 1973), *cert. denied*, 287 So. 2d 690 (Fla. 1973)

Defendant was convicted of breaking and entering with intent to commit a felony, possession of burglary tools, and grand larceny. The trial court imposed consecutive maximum terms for each offense. Defendant appealed, assigning as error the imposition of sentences for the latter two counts. The appellate court reversed and HELD, where possession of burglary tools and grand larceny constitute facets of a unitary criminal transaction culminating in the offense of breaking and entering with intent to commit a felony, the trial court could impose only one sentence, which could not exceed the maximum term for the most serious charge proved.[1]

A single course of criminal conduct frequently comprehends more than one statutory offense. It is settled law that a defendant may be tried for and convicted of each offense committed during a criminal transaction,[2] but there is little agreement whether he may be sentenced for more than one such offense[3] or whether multiple sentences, if imposed, should be consecutive or concurrent.[4] Some courts that impose multiple sentences for offenses within a single transaction fail to distinguish cases in which the defendant has committed unrelated crimes,[5] citing public policy[6] or the discretionary power of common law courts in sentencing[7] to justify this practice.

Some courts have recognized, however, that cumulative sentencing for offenses within the same transaction may impose excessive or arbitrary punishment,[8] and a few states have enacted legislation that prohibits sentencing under more than one statute for a single criminal transaction.[9] Other states

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1. 280 So. 2d 449 (2d D.C.A. Fla. 1973), *cert. denied*, 287 So. 2d 690 (Fla. 1973).

2. Cone v. State, 285 So. 2d 12 (Fla. 1973); State v. Willhite, 40 N.J. Super. 405, 123 A.2d 237 (Somerset & Morris County Ct., L. Div. 1956).

3. *Compare* Williams v. State, 205 Md. 470, 109 A.2d 89 (1954), *with* People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950).

4. *Compare* People *ex rel.* Maurer v. Jackson, 2 N.Y.2d 259, 140 N.E.2d 282 (1957), *with* Williams v. State, 321 P.2d 990 (Crim. App. Okla. 1957), *aff'd*, 358 U.S. 576 (1958).

5. *See, e.g.*, State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960); Williams v. State, 205 Md. 470, 109 A.2d 89 (1954); State v. Byra, 128 N.J.L. 429, 26 A.2d 702 (Sup. Ct. 1942), *aff'd*, 30 A.2d 49 (Ct. Err. & App. N.J. 1943), *cert. denied*, 324 U.S. 884 (1944); Rogerson v. Harris, 111 Utah 330, 178 P.2d 397 (1947).

6. Mead v. State, 489 P.2d 738, 743 (Alas. 1971).

7. *See, e.g.*, Williams v. State, 205 Md. 470, 109 A.2d 89 (1954); State *ex rel.* Meininger v. Breuer, 304 Mo. 381, 264 S.W. 1 (1924). *See also* Sherman v. United States, 241 F.2d 329 (9th Cir.), *cert. denied*, 354 U.S. 911, *rehearing denied*, 355 U.S. 852 (1957); *Ex parte* Sabongy, 18 N.J. Super. 334, 87 A.2d 59 (1952).

8. Munson v. McClaughry, 198 F. 72 (8th Cir. 1912); Wilson v. State, 24 Conn. 56 (1855) (Waite, C.J. dissenting).

9. *E.g.*, CAL. PEN. CODE §654 (West 1970), which provides in part: "[A]n act . . . which is made punishable in different ways by different provisions of this Code may be punished

rely on a judicially created rule substantially the same as the single transaction rule presently operative in Florida.[10] Federal courts, since *Bell v. United States*,[11] have been subject to the rule of lenity, which creates a presumption against cumulative sentencing for offenses within the same transaction absent evidence of congressional intent to the contrary.[12] The intent of Congress has not always been clear, however, so that federal courts often emasculate the rule by finding, sometimes unconvincingly, an intent to punish cumulatively.[13]

In Florida, punishment for offenses within the same transaction is limited to the maximum sentence for the most serious offense proved.[14] This "single transaction rule" is of common law origin, and was concisely stated in the 1861 case of *Cribb v. State:*[15]

> We consider the rule to be that if all the counts are good, and such as on which judgment can be awarded, and the evidence warrants the conviction, to pass judgment on the count charging the highest grade of offence . . . .

In addition to limiting the entry of judgment to the most serious offense, the single transaction rule has been held to prohibit concurrent sentences for the lesser offenses within the same transaction,[16] although the effect would be the same as if only one sentence were imposed.

Only one Florida supreme court opinion appears in conflict with the single transaction rule. In *Steele v. Mayo*[17] the court upheld the separate sentencing of convictions of breaking and entering with intent to commit grand larceny and grand larceny, even though the two offenses were "two aspects of the same transaction."[18] This departure from the rule was followed in *Footman v.*

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under either of such provisions, but in no case . . . under more than one." *See also* ILL. REV. STAT. ANN. ch. 38, §1005-8-4(a) (Smith-Hurd 1973); MINN. STAT. ANN. §609.035 (1963). Note, however, that Minnesota specifically excepts any crime committed after completion of a burglary from the statute's protection. *Id.* §609.535.

10. *See, e.g.,* People v. Florio, 301 N.Y. 46, 92 N.E.2d 881 (1950); Commonwealth v. Soudani, 398 Pa. 546, 159 A.2d 687 (1960).

11. 349 U.S. 81 (1955).

12. *Id. See also* Prince v. United States, 352 U.S. 322 (1957).

13. *See, e.g.,* Gore v. United States, 357 U.S. 386 (1957); Blockburger v. United States, 284 U.S. 299 (1932); Comment, *Twice in Jeopardy,* 75 YALE L.J. 262, 313-21 (1965). Nor is it always clear which acts fall within a single transaction. *See also* Irby v. United States, 390 F.2d 432, 432-42 (D.C. Cir. 1967) (Bazelon, C. J., dissenting). The matter is further complicated by the revival in Ashe v. Swenson, 397 U.S. 436, 448-60 (1970) (Brennan, J., concurring), of the common law notion of "single transaction" as the equivalent of "offense" for purposes of the double jeopardy clause. Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee,* 65 YALE L.J. 339, 364 (1956).

14. Cone v. State, 285 So. 2d 12 (Fla. 1973); Williams v. State, 69 So. 2d 766 (Fla. 1953); Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942); Davis v. State, 277 So. 2d 300 (2d D.C.A. Fla. 1973).

15. 9 Fla. 409, 416 (1861).

16. Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942).

17. 72 So. 2d 386 (Fla. 1954).

18. *Id.*

State[19] where the Second District Court of Appeal upheld separate sentences for these same offenses on the ground that they were two distinct crimes and therefore not part of the same criminal transaction.[20] The Second District, however, receded from this position in *Davis v. State*,[21] specifically because *Footman* could be understood to imply that burglary and larceny were cumulatively punishable.[22] The *Footman* decision, nevertheless, served as unfortunate precedent for other intermediate appellate courts.[23] It is against this confused background that the instant court sought to clarify the single transaction rule and to reestablish within its scope the three offenses of which the defendant was convicted.[24]

The court framed the issue in terms of the relation between the single transaction rule and legislative intent, finding the rule to be "presumptively declarative" of that intent.[25] The rule thus describes a judicial policy of statutory interpretation, the effect of which is to limit the discretionary power of the judge in sentencing.[26]

The court found the justification for the single transaction rule to be implicit in the policy underlying the legislature's creation of statutory crimes. In order to make the criminal statutory scheme applicable to the many possible configurations of criminal conduct, the court declared that the legislature had made each step in a given criminal transaction punishable.[27] To the same end, overlapping offenses were created with the result that more than one offense may describe the same act.[28] For example, a defendant may be statutorily convicted of both possession and sale of narcotics, even though possession is a necessary incident to the sale.[29] Similarly, unlawful dealing in securities may be punished both as "sale of unregistered securities" and as "sale of securities by an unregistered dealer," though the two offenses may

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19. 203 So. 2d 356 (2d D.C.A. Fla. 1967).

20. *Id.* at 357. The *Footman* decision rested in part on *Steele v. Mayo* and in part on the separation of the two offenses in two distinct chapters of the Florida statutes. FLA. STAT. §§810.02, .021(2) (1971). The court in *Footman* also seemed to justify its result on the ground that the Florida supreme court in *Steele* had somehow differentiated "aspects of the same transaction" from "facets of the same transaction." *See* Footman v. State, 203 So. 2d 356, 357 (2d D.C.A. Fla. 1967).

21. 277 So. 2d 300 (2d D.C.A. Fla. 1973).

22. *Id.* at 306. The *Davis* court also made clear that the "same transaction" doctrine could not "logically hinge upon the facile test of whether the two transactions fall within the same chapter of the Florida Statutes . . . ." *Id.*

23. *See* Foster v. State, 276 So. 2d 512 (1st D.C.A.), *rev'd*, 263 So. 2d 549 (Fla. 1973); White v. State, 274 So. 2d 6 (4th D.C.A. Fla. 1973); State v. Conrad, 243 So. 2d 174 (4th D.C.A. Fla. 1971).

24. *See* 280 So. 2d at 453-54.

25. *Id.* at 450.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id. See also* Yost v. State, 243 So. 2d 469 (3d D.C.A. Fla. 1971); FLA. STAT. §§404.02(1)-(4) (1971).

arise out of a single act.[30] The effect of such statutes is to ensure punishment of the defendant for one offense if proof for another is unavailable.[31]

Nevertheless, legislative intent to preclude escape from punishment does not necessarily evidence an intent to impose multiple sentences for offenses within a single criminal transaction; still less to impose such sentences in pyramid fashion.[32] Rather, the assumption should be that the legislature, in providing offenses to fit each facet of a criminal transaction, has considered the possibility that one transaction might constitute the commission of more than one crime within the same transaction and has set the maximum sentence accordingly.[33] Proceeding on this assumption, the instant court found possession of burglary tools to be merely incidental to the greater transaction of breaking and entering with intent to commit a felony, much as possession of narcotics is but an incident to their sale.[34]

The court had greater difficulty deciding whether grand larceny should be cumulatively punishable with the graver offense of breaking and entering with intent to commit a felony.[35] Without defining "single transaction,"[36] the court offered three justifications for including these offenses within the scope of the single transaction rule. There is, first, no historical evidence that the common law crimes of burglary and larceny were cumulatively punishable.[37] Although early English cases recognized many artificial distinctions in order to make successive prosecutions amenable to the rigid forms of pleading,[38] these cases in no wise sanction cumulative punishment for burglary and larceny.[39] The modern English statutory formulation supports this historical interpretation, as it appears to merge the two offenses at issue in the instant case.[40]

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30. 280 So. 2d at 450. *See also* Sparks v. State, 256 So. 2d 537 (4th D.C.A. Fla. 1971); Easton v. State, 250 So. 2d 294 (2d D.C.A. Fla. 1971); FLA. STAT. §§517.07, .12 (1971).

31. 280 So. 2d at 450.

32. *Id.*

33. *Id.* at 451.

34. *Id.* at 450. Thus, the defendant could not receive a sentence for possession of burglary tools in addition to the more serious crime of breaking and entering.

35. *Id.* The court found grand larceny, like possession of burglary tools, to be incidental to the breaking and entering under the facts of the instant case so as to invoke the sentencing limitations of the single transaction rule. Although many of the arguments favoring inclusion of the crimes of possession of burglary tools within the single transaction rule have equal validity with respect to the crime of grand larceny, the court felt compelled to explain why grand larceny and burglary should not be cumulatively punishable and thus turned to a historical and functional analysis.

36. *See id.* However, in Davis v. State, 277 So. 2d 300, 305-06 (2d D.C.A. Fla. 1973), the same court indicated that a single transaction would include acts necessary and incident to the accomplishment of a given criminal objective: "[A]s to the breaking and entering and petit larceny charges, it must be presumed that the perpetrator breaks and enters with a purpose and that the accomplishment of that purpose [the petit larceny] can only be classified as part of the same criminal act."

37. 280 So. 2d at 451.

38. *Id. See also* Comment, *supra* note 13, at 343.

39. 280 So. 2d at 451.

40. *Id. See also* Theft Act 1968, c. 60, §9 [England].

Second, although some American cases uphold cumulative punishment for burglary and larceny,[41] many do not express an unqualified approval of the practice.[42] Doubts expressed in *Ex parte Peters*,[43] lead rather to the conclusion that some cumulative sentences have been allowed to stand only because they were less severe, in the aggregate, than the maximum sentence permitted for the gravest offense within the transaction.[44] *Steele v. Mayo*[45] would also seem to fit this pattern, especially when read in context with other Florida decisions.[46] Thus viewed, *Peters* and *Steele* are consonant with the purpose of the single transaction rule: to curtail excessive sentences.

Further justification for including the crimes of grand larceny and breaking and entering with intent to commit a felony within the single transaction rule is found in the Florida statutory scheme, which does not reveal an intent to impose cumulative punishment for these offenses.[47] Conviction of breaking and entering carries maximum penalties of five or fifteen years, according to whether the intent is proved to be felonious.[48] In the instant case, grand larceny was proved, thereby establishing the *mens rea* for the more serious offense. The court refused to believe that the legislature intended to punish the completed grand larceny in addition to the felonious breaking and entering, which already carried with it a far more severe punishment than the less serious offense.[49] Had the legislature intended such a result it could have so provided, as has, for example, the Missouri Legislature.[50] The court concluded that the legislative intent embodied in the Florida statutes demands conformity with those jurisdictions in which burglary and larceny are not cumulatively punishable.[51]

The instant court avoided any confusion of the protection afforded by the single transaction rule with that afforded by the constitutional prohibition

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41. *See, e.g.*, Rogerson v. Harris, 111 Utah 330, 178 P.2d 397 (1947), which does not distinguish between "same transaction" for purposes of conviction and for purposes of sentencing.

42. *See, e.g.*, Halligan v. Wayne, 179 F. 112 (9th Cir. 1910); *Ex parte* Peters, 12 F. 461 (C.C.W.D. Mo. 1880); Wilson v. State, 24 Conn. 56, 69 (1855) (Waite, C. J., dissenting).

43. 12 F. 461 (C.C.W.D. Mo. 1880). *See also* Munson v. McClaughry, 198 F. 72, 74-75 (8th Cir. 1912).

44. *See Ex parte* Peters, 12 F. 461, 464 (C.C.W.D. Mo. 1880).

45. 72 So. 2d 386 (Fla. 1954).

46. *See, e.g.*, Young v. State, 69 So. 2d 761 (Fla. 1954) (where gambling offenses related to the same transaction, there could be only one sentence and punishment, and the sentence was to be imposed on the count charging the higher grade or degree of offense); Simmons v. State, 151 Fla. 778, 10 So. 2d 436 (1942) (in interest of uniformity, court could not impose concurrent sentences for offenses constituting different aspects of the same transaction, even though practical effect would be the same as imposing one sentence for the highest offense proved).

47. 280 So. 2d at 452.

48. FLA. STAT. §§810.02, .05 (1971).

49. 280 So. 2d at 452.

50. MO. REV. STAT. §560.110 (1959), *amending* Mo. Rev. Stat. §560.110 (1957). *See also* MINN. STAT. ANN. §609.585 (1963).

51. 280 So. 2d at 452.

against double jeopardy.[52] Unlike the latter protection, the single transaction rule shields a defendant from multiple punishment where there is no constitutional bar to such punishment.[53] The court also emphasized that the judicial power to subject a defendant to successive prosecutions does not permit the imposition of cumulative sentences for offenses within a single transaction.[54] Finally, the court viewed the limitation on punishment contained in the single transaction rule as a small price to pay for the prosecutorial flexibility resulting from the increased number of statutory offenses.[55]

The single transaction rule represents a necessary and salutary restraint on judicial discretion in sentencing. The proper function of judicial discretion is to fit the punishment to the individual defendant within the parameters set by the legislature. The instant court clearly delineated the operation of the rule in preserving the delicate balance between judicial discretion and legislative intent in fixing criminal penalties.

Respect for legislative intent, however, should not be dependent solely upon the judicial presumption of the single transaction rule. Although the courts must be credited for having developed and implemented the rule, its importance is such that it should be given statutory form.[56] In this way legislative intent could be explicitly stated, and the single transaction rule could more effectively and consistently serve to prevent the imposition of excessive sentences.

Even in the absence of a statutory formulation, the single transaction rule in Florida is an indispensable and humanitarian protection for the criminal defendant. The clarification and support given the rule by the instant court further underscores its true importance. Society can ill afford to impose arbitrary or excessive sentences on those whose conduct it purports to correct.

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52. *Id.* at 453.

53. *Id.* at 450.

54. *Id.* at 453. The court thus stressed again the distinction between conviction and sentencing for crimes within a single transaction.

55. *Id.*

56. *See generally* Comment, *supra* note 13. The misdirection in the district courts of appeal prior to the instant case could have been avoided altogether by an adequately worded statute. Such a statute should also attempt to define a "single transaction." A statute that would accomplish both purposes is exemplified by the recently enacted Illinois Provision: "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective . . . ." ILL. ANN. STAT. ch. 38, §1005-8-4(a) (Smith-Hurd 1973). This statute echoes the Florida single transaction rule. Its enactment in Florida would not preclude cumulative punishment of crimes that were not necessary or incidental to the accomplishment of a given criminal objective. *See* People v. Smith, 6 Ill. App. 3d 259, 285 N.E.2d 460 (1972), indicating that the recent Illinois statute is a codification of preexisting decisional law. Furthermore, such a statute would not alter the spirit of present Florida decisional law. Davis v. State, 277 So. 2d 300, 305-06 (2d D.C.A. Fla. 1973).