

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ALEX RODRIGUEZ,

Appellant,

v.

Case No. 5D19-2346

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed August 14, 2020

Appeal from the Circuit Court
for Orange County,
Tom Young, Judge.

Robert Wesley, Public Defender, and
Robert Thompson Adams IV, Assistant
Public Defender, Orlando, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Bonnie Jean Parrish,
Assistant Attorney General, Daytona
Beach, for Appellee.

COHEN, J.

Alex Rodriguez appeals his convictions for home invasion robbery with a weapon, a first-degree felony punishable up to thirty years, and burglary of a dwelling with an assault or battery with a weapon, a felony punishable up to life.¹ Rodriguez raises two

¹ §§ 812.135(1)–(2), 810.02(2)(a), Fla. Stat. (2013), respectively.

issues on appeal: the denial of his motion to suppress and whether double jeopardy prohibits convictions for both offenses.

We find no abuse of discretion in the trial court's denial of Rodriguez's motion to suppress; the trial court's in-depth findings were supported by the evidence. See Pagan v. State, 830 So. 2d 792, 806 (Fla. 2002) (“[A] trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.” (citation omitted)). Thus, we affirm as to this issue.

However, as the State properly concedes, the trial court erred in its ruling on double jeopardy. Despite the assistant state attorney's argument below, the State acknowledges on appeal that double jeopardy precludes convictions for both burglary of a dwelling and home invasion robbery. See Fernandez v. State, 199 So. 3d 500 (Fla. 2d DCA 2016); Fleming v. State, 75 So. 3d 397 (Fla. 5th DCA 2011); Mendez v. State, 798 So. 2d 749 (Fla. 5th DCA 2001).

With the State's proper concession of error, we now must determine which of the two convictions to vacate. In Pizzo v. State, 945 So. 2d 1203, 1206 (Fla. 2006), the Florida Supreme Court held that in the double jeopardy context, the lesser crime should be vacated, which is the offense that has elements wholly subsumed by the other offense. See § 775.021(4), Fla. Stat. (2013). Utilizing the framework outlined in Pizzo, the court in State v. Tuttle, 177 So. 3d 1246 (Fla. 2015), held that burglary while armed is the lesser offense of attempted home invasion robbery with a firearm causing death or great bodily harm.

Although Justice Canady wrote a compelling dissent in Tuttle, 177 So. 3d at 1253–54, suggesting that for double jeopardy purposes, “lesser crime” should be determined by the severity of the sanction, we are bound by the majority opinion. As such, we remand to the trial court with directions to vacate the burglary conviction and sentence, and resentence Rodriguez accordingly.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

EDWARDS and SASSO, JJ., concur.