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IN THE SUPREME COURT OF FLORIDA

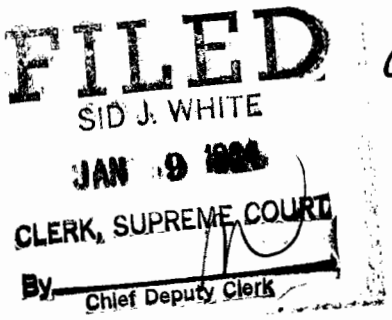
STATE OF FLORIDA,)

Petitioner,)

vs.) CASE NO.: 64,652

SHELTON PENSON DONALD, JR)

Respondent.)



PETITIONER'S BRIEF ON THE MERITS

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TOPICAL INDEX

TABLE OF CITATIONS

OTHER AUTHORITY

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
vs.	)	CASE NO.: 64,652
SHELTON PENSON DONALD, JR.	)	
Respondent.	)	

PRELIMINARY STATEMENT

The parties in this brief will be referred to as follows: The State of Florida, the prosecution in the trial court and the Appellee in the Court of Appeal, First District, is now referred to as the Petitioner; SHELTON PENSON DONALD, JR., defendant in the trial court and Appellant in the appellate court, is now Respondent and will be referred to by name or as Respondent.

The record on appeal consists of a single record volume which will be referred to by the symbol "R" followed by the appropriate page number(s). The single volume of transcript contains the transcripts of the proceedings of May 10, 1983, May 24, 1983, June 13, 1983 and June 20, 1983 before the Honorable Henry Lee Adams, Circuit Court judge. This volume will be referred to by the symbol "T" followed by the appropriate page number(s).

Petitioner directs attention to State v. Phillips, No. 64,547 currently pending review by this Court in which a similiar and related certified question is presented. (See, footnote 13, infra.).

The opinion of the Court of Appeal, First District, is appendixed hereto; however, the case is reported as follows:

Donald v. State, No. AT-362
(Fla. 1st DCA November 21, 1983) [8 FLW 2757]

STATEMENT OF THE CASE AND FACTS

Shelton Penson Donald, Jr. was charged by information dated February 24, 1982 with felony petit theft arising from the February 10, 1982 theft of less than one hundred dollars from the Division Street Grocery, in Jacksonville, Florida. (R 5). The information was captioned "FELONY PETIT THEFT" and referred in the text to a violation of Section 812.014(2)(c), Florida Statutes. Id.

The instant petit theft arrest involved two 16 ounce cans of beer stolen from a small neighborhood grocery. The record reflects that Respondent and a companion entered the store 4 or 5 times on the afternoon of the arrest. While one distracted the store clerk, the other stole beer. (R 2) On the last occasion, Respondent was stopped by the store manager who happened to drive up. The accomplice escaped and remains unidentified. (Id.)

On March 16, 1983, the State filed a Notice of intent to Seek Felony Petit Theft sentence. (R 12) The State relied upon prior petit larceny convictions arising on October 9, 1979 and January 25, 1982. Id. Respondent did not challenge the validity of the October 9, 1979 conviction. (R 18-49; 62-93; 95-96; 100-101).

As to the January 25, 1982 date provided, Respondent was actually convicted in two separate cases, Nos. 81-48184-MM and 48191-MM. (R 18, 62, 95, 100) The prosecution did not specify which conviction was to be used. (R 12).

Accordingly on May 3, 1983, Respondent filed a Motion to Dismiss pursuant to Rule 3.190(c)(4), Fla.R.Crim.P. alleging there were no material disputed facts in issue. (R 18, 18-49) At the May 24, 1983 hearing on the motion, the trial judge concluded the motion was legally insufficient in that the facts alleged by the defense in paragraphs 1-4 established a prima facie case of felony petit theft. (T 6-10) The "facts" alleged in paragraphs (a) - (f) were acknowledged to be legal conclusions with which the State was not bound to deny by traverse. (T 7-9) Rule 3.190(c)(4), Fla.R.Crim.P. The Motion to Dismiss was denied. (T 9) (R 60).

On June 9, 1983, the defense filed a second motion to dismiss which was identical to the previously filed motion. (R 62-93) (T 11) There was no reason given for filing such a repetitious pleading. The trial court declined to hear the motion on the June 13, 1983 trial date. (T 11)

Also on June 13, 1983 the defense filed a Motion to Dismiss under Rule 3.190 (b) alleging lack of jurisdiction. (R 100-101) The jurisdictional allegation advanced is not that argued. The validity of the charging instrument was never raised below by Donald. This factual admission was conceeded in the brief submitted in the District Court of Appeal. (See p.6) Instead Donald maintained at trial that the circuit court did not have jurisdiction due to the invalidity of the predicate conviction(s). Id. (T 11-17) The motion was taken under advisement and denied on June 17, 1983. (T 20, R 102).

In addition to the motion to dismiss, Respondent also filed a motion to suppress on the June 13, 1983 day of trial. (R 95-96; T 17-19) The motion sought to suppress the underlying convictions on essentially the same grounds: ". . .they were taken in violation of the rules because the circumstances do not reflect the voluntariness and that they not be allowed as competent evidence in this court." (T 18) The motion was denied as untimely. Id. (R 97)

Respondent never sought to set aside the nolo contendere pleas in the predicate offenses on grounds of involuntariness or on any other legal basis. (T 15, 13-15)

On appeal, Respondent filed an initial brief raising two issues. The first issue raised alleged failure of the information to specifically allege the element of prior convictions necessary to vest jurisdiction in the circuit court. (This is the question certified to this Court for review). The second argument focused on error in denying the motion to dismiss where the prior convictions were based on invalid pleas. This was the topic of the motion to dismiss which was presented to the trial court. (R 18-20; see also, 21-49)

Prior to the filing of an answer brief by the State, Donald filed a motion for summary reversal on the basis of Phillips v. State, No. AO-322 (Fla. 1st DCA September 14, 1983) [8 FLW 2270]. The State moved to strike the motion on September 21, 1983. A separate motion to toll was also filed.

At this point, the case history becomes somewhat confusing. On September 21, 1983 the Court of Appeal issued an order, presumably responsive to a September 15, 1983 extension request by the State, allowing until October 15, 1983 to file the State's brief. Assuming the Court of Appeal was considering the pending motion for summary reversal and corresponding motion to strike, the State did not file a brief, but awaited an order. On November 21, 1983, the Court of Appeal issued its opinion reversing on the authority of Phillips v. State and certifying the instant question to this Court.

Notice to invoke discretionary jurisdiction pursuant to Rules 9.030(a)(2)(v) and 9.120, F.R.App.P. was filed on December 16, 1983. The mandate was issued by the Court of Appeal on December 22, 1983.

QUESTION CERTIFIED

The Court of Appeal, First District, certified the following as a question of great public importance pursuant to Rules 9.030(a)(2)(v) and 9.120 F.R.App.P.

> Is a circuit court deprived of subject-matter jurisdiction when the caption of the charging document charges the defendant[s] with felony petit theft and the body thereof cites the proper Florida Statute, § 812.014(2)(c), but the text of the charge alleges the value of the property to be less than $100 and does not specify the substantive elements of two prior petit theft convictions?

Donald v. State. (Opinion appendixed hereto)

STATUTE INVOLVED

The statute involved in the instant appeal is Florida's Felony Petit Theft Statute which states:

> Theft of any property not specified in paragraph (a) or paragraph (b) is petit theft and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Upon a second conviction for petit theft, the offender shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

Section 812.014(2)(c), Florida Statutes.

POINT ON APPEAL

THE INFORMATION PROPERLY CHARGED THE OFFENSE OF FELONY PETIT THEFT AND THE CIRCUIT COURT PROPERLY ACQUIRED JURISDICTION OVER THE CAUSE

ARGUMENT

In this cause the charging document cited the Felony Petit Theft statute[1] and the information was captioned "Felony Petit Theft". (R 5). However, the text of the charging paragraph alleged value of the property at less than $100.00 and did not specify the prior convictions. Id. Donald argued on appeal that these omissions meant that only a misdemeanor was charged; thus, the circuit court never acquired jurisdiction to hear the case. He relied upon State v. Harris, 356 So.2d 315 (Fla. 1978) and Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981) and argued that the verdict, judgment and ensuing sentence were void. This argument was advanced for the first time in the appellate court.[2] On appeal, Donald maintained the defect was jurisdictional and could be noted even though no objection or motion to dismiss the information was made in the circuit court. Citing the earlier opinion in Phillips v. State, in which the Court of Appeal regretfully agreed with the position advanced, the First District reversed Id. at 2270.

In Phillips v. State, the Court of Appeal reasoned that the circuit court had felony jurisdiction over a "petit theft" "only if a conviction upon the charge laid in the information would be the

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1 Section 812.014(2)(c), Florida Statutes.

2 The issue presented to the trial court appeals as appellate ground two. (See brief, pp. 13-36) The first issue raised on appeal was not presented at trial. Donald conceeds this in his brief to the District Court. (See, p.6).

offender's 'third or subsequent conviction for petit theft'". Id. at 2270. The majority opinion emphasized that notice as to the nature of the charges had been provided to the accused, albeit imperfectly, by the caption of the information and filing of the Notice of Intent[3] to Seek a Felony Petit Theft Penalty based upon two prior petit theft convictions.[4] The pertinent portion of the district court's opinion in Phillips is as follows:

> . . . the charging part of the information simply alleged a petit theft violation of section 812.014(2)(c) in that Phillips on a certain date, in Duval County,
>
> > did knowingly obtain or use, or endeavor to obtain or use merchandise, valued at less than One-Hundred Dollars ($100.00), the property of Winn Dixie Stores, Incorporated, a corportion [sic], with intent to appropriate the property to her use or to the use of any person not entitled thereto, contrary to the provisions of Section 812.014(2)(c), Florida Statutes.
>
> Omitting reference in the information to Phillips' two prior convictions for petit theft, the state attorney obviously interpreted State v. Harris, 356 So.2d 315 (Fla. 1978), as authorizing or requiring that omission from the charging language in order to avoid the prejudice of revealing the allegation or fact of prior convictions to the trial jury. But Harris appears not to license that omission from the charging document, but only to require a separate post-verdict determination of prior convictions by the circuit judge.

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[3] The State emphasizes that in addition to these two factors, the text of the information cited a violation of Section 812.014(2)(c), Florida Statutes, which pertains to Felony Petit Theft.

[4] Notice of the prior offenses was provided on March 16, 1983; arraignment took place on February 28, 1983. It was the validity of the prior convictions that Donald challenged pursuant to the Motion to Dismiss the information filed May 3, 1983, June 9 and 20, 1983. (R 18-49; 62-93; 100-101)

> To omit the historical fact of prior convictions from the charging language of an information such as this is to charge only a petit theft, and is said to be a jurisdictional defect, not merely an imperfection in a felony charge that must be challenged by proper motion or else is waived.
>
> Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981) [information captioned "Grand Theft" under §812.014(2)(c)]; Brehm v. State, ____ So.2d ____ (Fla. 3d DCA 1983) [8 FLW 805] [information charging § 877.08 violation without alleging prior conviction for same offense]; see also State v. Black, 385 So.2d 1372 (Fla. 1980) [venue]; Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972), cert. denied, 283 So.2d 99 (Fla. 1973); Page v. State, 376 So.2d 901 (Fla. 2d DCA 1979); Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Dicaprio v. State, 352 So.2d 78 (Fla. 4th DCA 1977), cert. denied, 353 So.2d 679 (Fla. 1977); Boley v. State, 273 So.2d 109 (Fla. 4th DCA 1973), cert. denied, 287 So.2d 668 (Fla. 1973); but cf. Peek v. Wainwright, 393 So.2d 1175 (Fla. 3d DCA 1981).

Phillips at 2271.

State v. Harris, addressed Section 812.014(2)(c), Florida Statutes, and declared it a "substantive offense". Id. at 316. This Court stated:

> Section 812.021(3) provides in pertinent part, that upon the third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree (rather than a misdemeanor in the second degree). This statute creates a substantive offense and is thus distinguishable from Section 775.084, the habitual criminal offender statute.

Id. at 316. This Court further concluded that the Florida Legislature had the right to create the substantive offense of "felony petit larceny", but the judiciary possessed the right to "dictate the procedure to be employed in the courts to implement it." Id. at 317 citing Article V, Section 2, Florida Constitution.

State v. Harris, specifically disavows the procedure advanced on appeal by Respondent and mandated by the district court in its opinion, whereby specific information concerning the prior convictions is contained within the charging document.

> We therefore hold that Section 812.021(3) creates a substantive offense to be tried in the circuit court when felony petit theft is charged, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge. Upon conviction of the third petit larceny, the Court shall, in a separate proceeding,
>
> determine the historical fact of prior convictions, and questions regarding identity in accord with general principles of law, and by following the procedure now employed under Section 775.084.

State v. Harris at 317 (emphasis added).

The procedure set forth by this Court is that the fact of prior convictions will not be brought to the jury's attention during trial, but developed in a subsequent, separate hearing. A separate proceeding is necessary so as not to destroy the presumption of innocence in favor of the defendant. Pugh v. State, 423 So.2d 398 (Fla. 1st DCA 1982); State v. Harris at 317. The viability of this logic is readily apparent from the instant case. Here Donald obviously knew the nature of the charges against him and was not hampered in any manner in his preparation for trial. The majority opinion in Phillips acknowledged that the charging document satisfies the requirement of "notice" of the charges against the accused concluded the information was inadequate to confer jurisdiction in the circuit court. Phillips at 2270. We disagree with this conclusion as did Judge Wentworth. (See dissenting opinion in Phillips at 2271).

Proper jurisdictional allegations are as essential in an accusatory document as are those allegations relating to material elements of a crime. State v. Black, 385 So.2d 1372, 1375 (Fla. 1980). Florida caselaw holds that questions concerning subject matter jurisdiction involve a claim of fundamental error and can be raised at any time - even for the first time on appeal. Christopher v. State at 407; Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Dicaprio v. State, 352 So.2d 78, 79 (Fla. 4th DCA 1977) cert. denied 353 So.2d 679 (Fla. 1977); Solomon v. State, 341 So.2d 537 (Fla. 2d DCA 1977); Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972) rehearing denied. It is the State's position that the information in this case, which tracked the appropriate language, was captioned and cited the "Felony Petit Theft" and cited the controlling statute, Section 812.014(2)(c), Florida Statutes, was sufficient to confer jurisdiction in the circuit court. By citing the Felony Petit Theft Statute and using that caption on the information, the State has incorporated by reference[5] the language of the cited section defining felony petit theft. (See dissenting opinion, J. Wentworth, Phillips at 2271).

In Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982), the Fifth District held that if the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted

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[5] Where an information tracks the language of the statute and refers to a statute, it is generally held sufficient. State v. DiGuillio, 413 So.2d 478, 479 (Fla. 2d DCA 1982); Martinez v. State, 368 So.2d 338 (Fla. 1979); State v. Pajon, 374 So.2d 1070 (Fla. 3d DCA 1979).

words, it cannot be said that the imperfection of the information prejudiced the defendant in his defense. Id. at 853, see also authority cited therein. Hence Respondent Donald and the circuit court were on notice that the theft described in the information was the "third or subsequent conviction for petit theft". Section 812.014(2)(c), Florida Statutes. The information need not include the specific prior convictions. State v. Harris. Respondent obviously understood the nature of the charge against him and recognized the jurisdictional sufficiency of the information as he did not raise a pretrial challenge to the charging document pursuant to Rule 3.190(c)(4), Florida Statutes. Further, the trial court did not note, sua sponte, a jurisdictional defect and the dissenting opinion of Judge Wentworth in Phillips fails to detect a "jurisdictional problem" in the same manner of charging the crime utilized herein. Respondent's acknowledgement of jurisdiction in this case is particularly evident for three (3) separate dismissal motions were filed prior to entering entry of the nolo contendere plea. The instant argument was not presented in any of these motions.

Reliance in the Phillips opinion upon Christopher v. State, is misplaced. In Christopher, the defendant was charged by an information labeled "Grand Theft" but which charged the theft of merchandise of a value less than one hundred dollars. Subsequently, the State filed notice to prosecute as a subsequent offender pursuant to Section 812.014(2)(c), Florida Statute (1979). The defendant negotiated a plea to attempted grand theft and challenged the circuit court's jurisdiction on appeal. The instant facts are not analogous.

In Christopher, the title of the information read "Grand Theft", not Felony Petit Theft. The text of the charging document alleged a theft of less than $100.00. Thus, the caption (grand theft) was negated by the specific allegation of the amount involved. There was nothing else within the charging document which served to reference the enhancement provisions of the statute defining a felony based on other convictions. Phillips at 2271 (J. Wentworth, dissenting). Furthermore on appeal in Christopher, the State argued the use of the word less was a typographical error; the State intended to charge the defendant with theft or more than $100.00. The Court of Appeal, Fifth District, held the mistake to be fundamental. Accord, Phillips at 2271 (J. Wentworth). The information charged only a misdemeanor. However, the Fifth District opined that "if the proper procedure is followed, a felony petit charge is sufficient to vest jurisdiction in the circuit court". Id. at 407.

Judge Upchurch, writing for the District Court in Christopher advised of the proper procedure for the State to pursue:

> Had the State moved to amend the information as it should have done, the substantive offense of felony petit theft would have vested jurisdiction in the circuit court. Not only did the State fail to amend the information, but the proceedings were lacking the safeguards that Harris mandates.

Id. at 407. The State interprets this instruction to require the amendment of the information to allege "Felony Petit Theft" rather than "Grand Theft". No mention is made of adding factual information which would identify the prior convictions. Such action would still be inadequate to divest jurisdiction unless the "Grand Theft" caption was also altered.

The First District's reliance[6] on Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983) is also unsound. There the charging document failed to allege the specific statutory provision under which Defendant Brehm was charged. It appeared Brehm was charged and convicted of ten counts of violating Section 877.08(2) and (3), Florida Statutes (1981), Tampering with a Parking Meter, which is ordinarily a misdemeanor offense. Brehm at 826. However, subsection (4) provides for enhancement to a third degree felony upon prior conviction for the same offense. It was under this subsection that the State intended to charge Brehm in circuit court. However, the information filed did not specify the subsection and referred only to the general statutory provision. Nothing in the charging instrument could be construed to incorporate by reference the provisions of the statute necessary to confer jurisdiction in the circuit court. See Phillips at 2271, f.n.1. These are not the facts of this cause and application of the Christopher - Brehm holding is inappropriate. The holding in Brehm would apply in Respondent's case only if the State had charged violation of Section 812.014. However, the instant information specified a violation of subsection (2)(c) and carried a "Felony Petit Theft" caption.

In holding the alleged defect to be fundamental thereby permitting the issue to be raised for the first time on appeal, the District Court overlooked the holding of this Court in State v. King, 426 So.2d 12 (Fla. 1982) as well as its own opinions in State v.

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6 In Phillips v. State.

Cadieu, 353 So.2d 150 (Fla. 1st DCA 1977) and Pickelsimer, et al v. State, No. AR-155, et seq. (Fla. 1st DCA November 9, 1983) [8 FLW 2670] (suggestion for certification denied December 1, 1983).[7]

In State v. King, a juvenile prosecuted as an adult pursuant to Section 39.031, et seq. Florida Statutes, but not charged with a life or death offense was charged by indictment rather than by information. The juvenile was deemed to have waived the substantive right to be treated as a juvenile, which is jurisdictional by means of the charging device, if the issue was not raised in a timely manner before the trial court. Id. at 14. In setting forth its ruling in King, this Court reasoned that the accused should not be permitted to subject himself to a court's jurisdiction and defend his cause in the hope of an acquittal, and then if convicted, challenge the court's jurisdiction on the basis of a defect that could have been remedied if brought to the trial court's attention in a timely manner. Id. at 15. Thus a "jurisdictional" defect may be waived. The circumstances of Respondent Donald are nearly identical.

In State v. Cadieu, the Court of Appeal, First District, noting the same concerns voiced in State v. King, held that a more liberal standard of review must be utilized when a timely challenge is not made. Id. at 151; see also, Fountain v. State, 92 Fla. 262, 109 So. 463 (1926). Judge Smith, writing the majority opinion, stated:

> The information is cast in the statutory language. Though it is imperfect because it does not descend from statutory generalities to essential particulars, the information is not so defective that it is vulnerable to initial post-trial attack.

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[7] Admittedly Pickelsimer was entered subsequent to the opinion and rehearing order in this case. However the two opinions are contradictory. See infra.

> When confronted with an information that is defective only in failing to charge particulars within a generic statutory description of proscribed conduct, the accused must either challenge the information by motion, thus providing opportunity for a new and curative information or be satisfied with resolving his doubts by discovery and a motion for statement of particulars. The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely. Sinclair v. State, 46 So.2d 453 (Fla. 1950).
>
> Id.

As the foregoing quote indicates, State v. Cadieu comports with Judge Wentworth's dissenting opinion in Phillips v. State. Accord, Pickelminer et. al. The instant information is cast in "statutory language"; it "does not descend from statutory generalities to essential particularities"; it "is defective only in failing to charge particulars within a generic statutory description of proscribed conduct. . . ." Id. at 151. The holding in State v. Cadieu, is directly applicable here. Inasmuch as Respondent did not raise this specific challenge to the information pretrial, he has waived the right to do so.

The same concept was addressed by the Third District Court of Appeal in Peek v. Wainwright, 393 So.2d 1176 (Fla. 3d DCA 1981). There, the defendant challenged his conviction by petition for habeas corpus filed in the state courts. His specific allegation was that he had been sentenced and was serving time for a crime for which he was never charged or convicted. Peek had never been charged in

circuit court with felony petit theft,[8] but was ultimately sentenced for that offense. Admittedly jurisdiction in the circuit court was acquired in his case due to other felony charges. The District court in Phillips specifically notes that jurisdiction cannot be similarly conferred here. 8 FLW at 2270. See, Section 26.012(2)(d), Florida Statutes (1981). What is of importance to this case however is the attempt by the Third District Court of Appeal to extend due deference to the intent of the Florida Legislature when enacting the Felony Petit Theft Statute and of this Court's interpretation of that statute in State v. Harris. The opinion of the First District in Phillips overlooks the express intent of the Florida Legislature to punish three time offenders of petit theft. It is also inconsistent with State v. Harris. The considerations set forth in Peek v. Wainwright should apply here.

The logic of the First District was undermined by the susequent opinion of the same court in Pickelsimer et al v. State. Identical jurisdictional arguments were submitted by each of the seven defendants represented in that consolidated opinion.[9] Jurisdiction

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8 Interestingly the charging document in Peek failed to allege any of the defendant's prior convictions. Information on the prior offenses was provided by a pretrial notification of enhancement pursuant to Section 775.084, Florida Statutes. Peek was convicted of petit theft rather than robbery. Subsequently the state served notice to enhance pursuant to Section 812.014(2)(c), Florida Statutes and he was so sentenced.

9 We emphasize that although motions to dismiss were filed in this cause, the jurisdictional ground upon which reversal was based was never presented at the trial level.

was raised in the circuit court pursuant to a pretrial motion to dismiss the information and served as the basis for appeal. Yet the First District did not address the jurisdictional aspect. The court refused to "speculate" as to the outcome if the defendants had not filed motions to dismiss. With due respect to the First District, the issue presented is either jurisdictional or it is not. If it is, the circuit court is without authority to hear or to rule upon the motion to dismiss the information. The entire proceeding is a nullity. The court cannot choose to reach the "asserted jurisdictional nature of the omissions here in question". Id. Jurisdiction the key issue. It is not "speculation" unless the issue is viewed from the dissenting opinion in Phillips.[10] Of course if the rationale of State v. King and State v. Cadieu is applied so that a more liberal standard of review is utilized for jurisdictional issues, then the opinion in Pickelsimer is proper. However in that event, the holding of King and Cadieu would apply equally well in the instant cause. Under such application it is apparent that Respondent Donald (as well as the defendant in Phillips waived whatever nonfundamental jurisdictional defect that may have existed. The opinion in this case and those in Pickelsimer and Phillips, cannot be reconciled by any other reasoning. Accord, State v. Gray, 435 So.2d 816, 818 (Fla. 1983).[11]

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[10] Judge Wentworth wrote the majority opinion in Pickelsimer, the dissenting opinion in Phillips.

[11] State v. Gray was cited by Respondent in support of his position in the court of appeal. (See, brief, p.17) Respondent's reliance is misplaced for unlike Gray, the instant information does charge a crime. Moreover unlike Gray, the instant information is drafted in substantially the language of the statute. Accord, Phillips at 2271. (J Wentworth, dissent).

In conclusion, the State submits the instant information was sufficient to incorporate by reference the language of the cited statutory provision defining felony petit theft so as to inform the accused that she was charged with a third or subsequent conviction for petit theft and to confer jurisdiction in the circuit court. Jones v. State; State v. Gray, at 818; Phillips v. State at 2271 (J. Wentworth, dissenting). This is particularly evident in the instant cause where the parties and the trial court so understood the information without objection to the lack of factual information of the prior convictions. The State submits the circuit court is not deprived of subject matter jurisdiction when the caption of the charging document charges felony petit theft and the body of the information refers to the proper statutory provision but the text alleges the value of the property to be less than $100 and does not specify the substantive elements of two prior petit theft convictions pursuant to the dictates of State v. Harris. We urge this Court to answer the certified question[13] in the negative thereby reversing the decision of the Court of Appeal, First District.

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[13] A more narrow question was certified for review in Phillips v. State:

> Whether absent objection or motion to dismiss in the circuit court the defect found in the charging instrument should be noticed on appeal as jurisdictional.

Id. at 2271. State v. Phillips, No. 64,547 is currently pending in this Court. The State submits that the narrower question presented in State v. Phillips must also be answered in the negative.

Respondents second argument on appeal was not addressed by the District Court of Appeal and was not certified to this Court for review. The identical issue is pending before the First District in the following cases which have been scheduled for oral argument on January 31, 1984.[14] Allen v. State, No. AS-461; Boggs v. State, No. AS-246; State v. Sheffield, No. AT-299; State v. Brookins, No. AT-311. Should this Court, elect sua sponte, to review the propriety of evaluation of the predicate petit theft convictions prior to a conviction on the third or subsequent substantive offense, contrary to State v. Harris, the State will gladly submit a supplemental brief on the issue.

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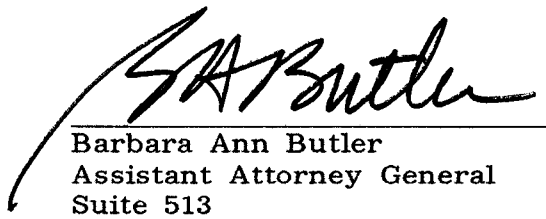
[14] The cases were consolidated for purposes of argument only.

CONCLUSION

Based on the foregoing argument, supported by the circumstances and authorities cited herein, Petitioner respectfully maintains that the issue presented herein is not jurisdictional in nature and therefore must be raised timely and specifically in the trial court in order to preserve review of the legal issue on appeal. The certified question should be answered in the negative. Petitioner requests that this Court reverse the decision of the Court of Appeal thereby affirming the judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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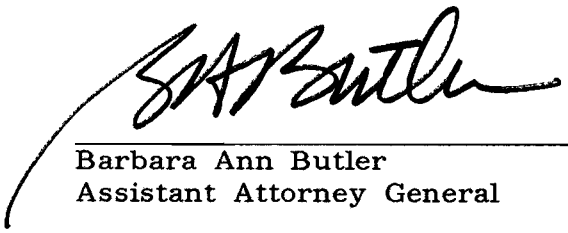
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Gwendolyn Spivey, Esquire, Assistant Public Defender, P. O. Box 671, Tallahassee, Florida 32301, this 6th day of January, 1984.



Barbara Ann Butler
Assistant Attorney General

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