IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S REPLY BRIEF

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OTHER AUTHORITY

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PRELIMINARY STATEMENT

Since the filing of the State's initial brief, the Court of Appeal, First District, has entered a reversal in O'Neal v. State, No. AT-179 (Fla. 1st DCA February 8, 1984) (9 FLW 355) on the authority of Phillips v. State, 438 So.2d 886 (Fla. 1st DCA 1983), currently pending before this Court as State v. Phillips, No. 64,547, and Donald v. State, No. AT-362 (Fla. 1st DCA November 21, 1983) [8 FLW 2757]. In O'Neal v. State, the First District certified the following as a question of great public importance:

> Is a circuit court deprived of subject-matter jurisdiction went 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?

Id. This is substantially the same question pending in this cause.

Respondent's brief on the merit will be referred to by the symbol "RB".

STATEMENT OF THE CASE AND FACTS

Rule 9.210(c), F.R.App.P. states that an answer brief shall omit the statement of the case and facts "unless there are areas of disagreement, which should be clearly specified." Id. Although Respondent's brief is technically a brief on the merit, there is nothing in this Court's briefing schedule or the accompanying sheet of directions for cases "certified [as of] great public importance" which circumvents the appellate rules of procedure. See, 9.120(f), F.R.App.P.

POINT ON APPEAL

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

ARGUMENT

Several assertions in Respondent's brief merit reply.

First, Respondent Donald contends it is the State's "unwarranted supposition" that State v. Harris, 356 So.2d 315 (Fla. 1978) "'specifically disavows the procedure. . . whereby specific information concerning prior convictions is contained within the charging document.'" (RB 9) In reaching this conclusion Respondent examines the authority cited in State v. Harris for charging and convicting second offenders. See, State ex rel Lockmiller v. Mayo, 88 Fla. 96, 101 So. 228 (1924); Barnhill v. State, 41 So.2d 329 (Fla. 1949); Nichols v. State, 231 So.2d 526 (Fla. 2d DCA 1970); Shargaa v. State, 102 So.2d 809 (Fla. 1958). These earlier decisions required the State to submit sufficient proof to the jury of the currently charged offense as well as the historical fact of the prior convictions. Id.; cf. State v. Shargaa. However it cannot be conclusively shown that the "only 'conflict' disapproved in Harris was Nichols' provision that the jury be the trier of fact as to the prior convictions". (RB 7)

Respondent submits that Nichols v. State "was not overruled in toto"[1] as this Court "did not, expressly or by implication, hold [in Harris] that the charging document could omit the prior offenses relied upon as essential elements of the charge." (RB 8,7) Admittedly, State v. Harris does not contain such a specific and express holding. However the implication is there. This Court stated:

> Section 812.021(3) and Section 775.084 are essentially identical, with similar purposes, and should afford to a defendant the same procedural safeguards. Under Section 775.084, the State must proceed against a defendant in a separate proceeding by a separate writing, following conviction or adjudication of guilt. No evidence is presented concerning a defendant's prior conviction and thus, there can be no possibility of prejudice. Under Section 812.021(3), the State must specifically allege and prove the fact of prior conviction. The jury is directly confronted with evidence of the defendant's prior criminal activity and the presumption of innocence is destroyed.
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> We are thus faced with conflicting holdings between Shargaa and Nichols.

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[1] In Nichols v. State, the defendant was charged with six counts of violating the State beverage laws by unlawful sale of intoxicating beverages without a State liquor license. All counts were identical except for allegations of different dates of sale and different brands of beverages. Each count alleged as the prior conviction the August 30, 1965 beverage law violation. On appeal, Nichols complained of error in permitting "'a prior conviction and a current offense to be presented to a jury at one and the same time, whether by reading an information, or by evidence, even under a second offender statute', and that to do so constituted a violation of due process, the right to a fair and impartial trial and an attack upon the defendant's character and reputation.'" Id. at 527 quoting Nichols' appellate brief. Nichols raised three other issues on appeal. In Harris, this Court "overruled the holding in Nichols v. State, supra, to the extent that it conflicts with Shargaa." Harris at 317.

Id. at 316-317. This Court concluded that the Legislature was authorized to create the substantive offense of a felony petit theft, but the Courts were empowered[2] to dictate the implementation procedure. Id. Justice Hatchett, writing for the Court, set forth the approved procedure.

> 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.

Id. (emphasis added).

Rule 3.400, F.R.Crim.P., does not mandate that the charging document be tendered to the jury during deliberation. Donaldson v. State, 356 So.2d 351 (Fla. 1st DCA 1978). Yet the previously quoted portion of Harris can easily be interpreted as requiring that specific data pertaining to the prior convictions not be included in the charging document itself. This interpretation is proper when viewed in conjunction with the remainder of the Harris opinion.

> 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 procedures now employed under Section 775.084.

Id. at 317. (emphasis added) As previously stated, the procedures delineated under Section 775.084, require:

> . . . the State must proceed against a defendant in a separate proceeding, by a separate writing,

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[2] Article V, Section 2, Florida Constitution.

> following conviction or adjudication of guilt. No evidence is presented [in the substantive offense] concerning a defendant's prior conviction and thus, there can be no possibility of prejudice.

Harris at 316.

Accordingly the State's position is a permissible interpretation. It is apparent that the procedure advocated by the State is a good faith attempt to preserve the presumption of innocence pursuant to the dicates of State v. Harris and to properly charge the substantive offense of Felony Petit Theft. Inasmuch as both the prosecution and defense have plausible interpretations of the procedure approved in Harris, it is incumbent upon this Court to clarify its earlier directive.

Second, Respondent argues that State v. Black, 385 So.2d 1372 (Fla. 1980), sufficiently undermines that State's argument that jurisdiction was acquired by citing the Felony Petit Theft statute within the text of the information and using that caption. The factual circumstances of State v. Black are not analogous to those of this case. In Black, the indictment for first degree murder failed to specify the place where the crime took place. The defect was both a deprivation of notice enabling the accused to prepare a proper defense and a failure to fix the jurisdiction of the grand jury and the court. The unique considerations of the indictment procedure were discussed at length[3] and do not relate to the instant procedure of

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[3] See, State v. Black (J. England, specially concurring) at 1375-1377.

charging a criminal offense by information. Dean v. State, 414 So.2d 1096, 1099 (Fla. 2d DCA 1982). Also absent from State v. Black is the interrelation between the statutory reference in the text of the information and the caption.

The State notes that in State v. Black, unlike the instant case, the venue deficiency was raised pre-trial pursuant to a motion to dismiss. A similar argument was advanced for the first time on appeal in Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982) and the question certified[4] to this Court for review. Tucker v. State, No. 62,683, currently pending (Oral Argument was held August 31, 1983). In Tucker, the Third District distinguished between venue, the geographical subdivision in which a court of competent jurisdiction may determine the case, and subject-matter jurisdiction, the inherent power to decide a case. Id. at 1009. However the point Respondent advances, that use of the caption "Felony Petit Theft" in conjunction with the statutory reference is insufficient to vest jurisdiction in the circuit court, is not supported by State v. Black.

The Felony Petit Theft statute is a legislative creation enacted for a specific purpose. This Court has dictated the procedures for its implementation. Just as first degree murder has unique proce-

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4 The following question was certified:

It is error in the failure of an indictment to specify the place where the crime allegedly occurred so fundamental that it may be urged on appeal, though not properly presented at the trial court, where the defendant is not hindered in the preparation or presentation of his defense and the situs of the crime is proved at trial? Tucker v. State at 1013 and 1020, n. 16.

dures to safeguard certain express constitutional concerns, so to has the felony petit theft statute. The method used to charge the offense in the Respondent's case may not be the proper method to charge another criminal offense, but it is sufficient to vest jurisdiction in the circuit court and to allege the offense of felony petit theft. Compare, Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981) (Discussed in the State's initial brief at pp. 14-15) and Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983) (Discussed in the State's initial brief at p. 16). See also Pickelsimer v. State, 440 So.2d 47, 48, n. 1 (Fla. 1st DCA 1983).

Third, Respondent's argument concerning incorporation by reference must fail for the same reason. Although Section 812.014(2)(c) refers to initial as well as repetitive violations of the same statutory provision, the combination of the caption, and the statutory reference is sufficient to vest jurisdiction in the circuit court. The information contained a specific description of the single petit theft which the statute classifies as a misdemeanor except "upon a third or subsequent conviction. . . the offender shall be guilty of a felony. . . ." Section 812.014(2)(c). The use of the term "Felony Petit Theft" and filing the information in circuit court evidences a felony charge rather than a second degree misdemeanor as urged by Respondent. (RB 11-12) The information is sufficient to incorporate by reference the language of the cited section defining felony petit theft. Harris at 888; Phillips v. State at 888, (J Wentworth, dissenting).

The defect within an information should be termed "fatal" only where there is a total omission of an essential element of a crime or where the information is so vague, indistinct and indefinite as to mislead the accused and embarrass the preparation of the defense or permit a new prosecution for the same offense. State v. Fields, 390 So.2d 128, 130 (Fla. 4th DCA 1980). Gray v. State, 404 So.2d 388, 391 (Fla. 5th DCA 1981). The failure to allege one ingredient of an offense does not render the information invalid as wholly failing to state a crime. Tracey v. State, 130 So.2d 605 (Fla. 1961); State v. Taylor, 283 So.2d 882, 885 (Fla. 4th DCA 1973); Asmer v. State, 416 So.2d 485, 487 (Fla. 4th DCA 1982). This is particularly true where the information charges the specific section of the statute under which the prosecution proceeds. Asmer v. State. The State would further submit that the failure to allege one ingredient of an offense by routine methods does not render the information fatally defective.

The State emphasizes that the prosecution also supplied Respondent with a Notice of Intent providing specific data on the prior convictions relied upon by the State. (R 12) It is this procedure which this Court sanctioned in urging that the procedures now employed under Section 775.084 be followed. Harris at 317. The validity of the October 9, 1979 conviction was never been contested. (R 18-49; 62-93; 95-96; 100-101) See, Pugh v. State, 423 So.2d 398,399 (Fla. 1st DCA 1982).

Felony Petit Theft is a substantive offense, not an enhancement. However given its special nature and the desire to afford the accused the presumption of innocence, the procedures used to charge the offense are similar to those enhancement provisions set forth in Section 775.084. Harris at 317. While enhancement of a charge is technically different from enhancement of punishment, the similarity is sufficient to justify analogizing one to the other.

There is a difference between an information which totally fails to vest jurisdiction and one which is imprecise and perhaps imperfect due to the special considerations evident in charging a particular offense. The State submits the instant information is not fundamentally defective.

Fourth, Respondent's attempt to rationalize Pickelsimer v. State is factually incorrect. The issue raised by the defense was that "the flaw in the information was a fundamental error that could be raised at any time." (RB pp. 19-20) The factual differentation between the cases consolidated with Pickelsimer and those of Respondent Donald and Phillips is that the Pickelsimer defendants raised the jurisdictional issue before the trial court pursuant to a pretrial motion to dismiss.[5] (See Appendix).

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[5] Rule 3.190(b), F.R.Crim.P.

The First District did not address the jurisdictional argument, but decided the cases on the basis of the timely objection below:

> The timely motions in these cases clearly brought to the attention of the state and the trial court the defendants' objections to the generality of the informations in alleging only the deprivation of property valued at less than $100 in violation of the cited felony petit theft provision, § 812.014(2)(c), Florida Statutes. We conclude that defendants were entitled at that point to informations which were not ambiguous in identifying the prior convictions relied upon to render conviction on the current charge "a third or subsequent conviction for petit theft" and make defendants "guilty of a felony" in the language of the statute incorporated by reference in the informations. The motions should therefore have been granted for that reason, and we need not, accordingly, speculate as to the outcome if defendants had not filed motions to dismiss, and we need not reach the issue presented in Phillips v. State, 438 So.2d 886 (Fla. 1st DCA 1983, as to the asserted jurisdictional nature of the omissions here in question.[1]
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> [1] We note, however, that the decision cited by movants in this case, Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981), involved an information which, even when read in conjunction with the statute there referenced, did not state a charge cognizable by the circuit court. Defendant there was faced with a patent inconsistency between caption and body of the charging instrument and clearly could not properly be tried for theft of a larger amount than that specified, based upon allegations of clerical error. Cf. Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982), for application of the doctrine of incorporation by reference to statutes in charging instruments.

Id. at 48. Respondent Donald did not raise a jurisdictional challenge in the trial court. However the argument raised in Pickelsimer is the argument presented herein. (See, Exhibit C, p. 13 in particular).

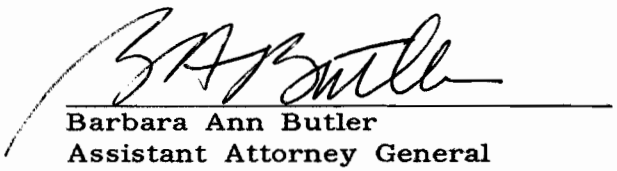
Lastly, the State submits that in Hinson v. State, 436 So.2d 437 (Fla. 4th DCA 1983), the circuit court was permitted to retain jurisdiction over an offense charged as a felony violation of Section 509.151, Fla. Stat. (1981), but which in actuality charged only a misdemeanor offense. The information failed to allege that the food, lodging and other accomodations were valued at one hundred dollars or more. The Third District reversed and remanded with instructions to impose a misdemeanor sentence. See also, Lumia v. State, 372 So.2d 525 (Fla. 4th DCA 1979).

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 timely raised 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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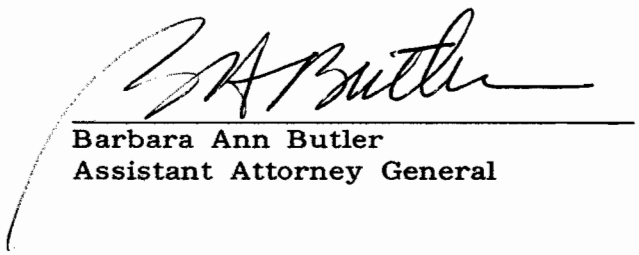
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one true and correct copy of the foregoing has been furnished by mail to Michael J. Minerva, Esquire, and Gwendolyn Spivey, Esquire, Assistant Public Defender's, P. O. Box 671, Tallahassee, Florida 32301, this 22 day of February, 1984.



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