O/A 10-4-84

IN THE FLORIDA SUPREME COURT

CASE NO. 64,763

DUDE EMSHWILLER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The parties herein will be referred to by their proper names or as they appeared before the trial court. The record on appeal, which consists of one volume, will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Inasmuch as the only issues presently before this Honorable Court are whether "retail theft" is a crime separate and distinct from "grand theft" where value is alleged and proved, and whether the trial court erred by instructing the jury on value of merchandise pursuant to Florida Statute 812.015(1)(c), the State of Florida, Respondent herein, will accept the Statement of the Case and Facts as set forth in the Petitioner's brief on the merits.

ARGUMENT

ISSUE I

WHETHER "RETAIL THEFT" OF MERCHANDISE, AS DEFINED IN SECTION 812.015, FLORIDA STATUTES, WHERE VALUE IS ALLEGED AND PROVED, IS A SEPARATE CRIMINAL OFFENSE FROM "THEFT" AS CONTEMPLATED BY SECTION 812.014, FLORIDA STATUTES.

This Honorable Court has accepted this case for discretionary review to resolve the conflict between the instant cause and Tobe v. State, 435 So.2d 401 (Fla. 3d DCA 1983). In its decision below, the Florida District Court of Appeal, Second District, concluded that, where value is alleged and proved, there is no crime of "retail theft" separate and distinct from "theft." Emshwiller v. State, 443 So.2d 343 (Fla. 2d DCA 1983). The well reasoned decision of the Second District Court of Appeal was correct.

In Tobe, supra, the Third District Court of Appeal determined that retail theft and grand theft are separate and distinct crimes imposing separate and distinct sentences. It is difficult to comprehend how this unbuttressed conclusion sprang forth. In his brief, Emshwiller acknowledges that Florida Statute §812.015 does not provide for a penalty for first convictions of "retail theft" (Petitioner's Brief on the Merits at pages 5, 8). In Emshwiller, supra, the Second District also recognized that:

> While §812.015(1)(d) defines "retail theft," nowhere in §812.015 is any specific punishment prescribed for "retail theft," nor is it designated either a felony or a misdemeanor. (Text at 345).

Inasmuch as §812.015 neither prescribes a penalty for violation thereof nor designates violation thereof as either a felony or a misdemeanor, "retail theft" is not a crime. See Florida Statute §775.08(4).

In Emshwiller, supra, the Second District analyzed the legislative history of what are now Florida Statutes §812.014 and §812.015. Your Respondent would adopt the analysis of the legislative history of the theft and retail theft statutes as rendered by the Second District Court of Appeal and would further observe that nowhere in the history of those statutes was a crime of "retail theft" ever created. Rather, the offense commonly known as "shoplifting" was simply part of the general larceny statute, §811.021, Florida Statutes (1973). The statutes have evolved to their present form so that activity known in 1973 as "shoplifting" and presently known as "retail theft" was and is proscribed by the former larceny statute and present theft statute. Emshwiller contends before this Honorable Court that the Second District Court of Appeal reached a contradictory conclusion with respect to treatment of the retail theft statute. He relies on the fact that the Second District stated that a charge could be made under §812.015 in regard to the taking or carrying away of merchandise, altering or removing a label or price tag, transferring merchandise from one container to another, removal of a shopping cart, or theft of farm produce where the element of value is not alleged, or if alleged, not proved. Emshwiller, supra, at 346. However, the state would assert that no such "contradiction" exists. The Second District

found that a misdemeanor of the second degree pursuant to §812.014(2)(c) would be committed upon violation of the items defined in §812.015(1)(d). The rationale behind that assertion is recognized by Emshwiller in this brief where he recognizes that the taking of any property is worth something and constitutes a petit theft if no value is ever proved (Petitioner's Brief on the Merits at page 10). In other words, where value is not alleged, a defendant is only charged with a petit theft. Likewise, if the probata at trial fails to establish that property was taken with a value of $100.00 or more, a conviction for only petit theft may be properly obtained. Thus, as the Second District correctly concluded, where value of $100.00 or more is both alleged and proved, the defendant charged therewith is properly convicted of grand theft. The distinction drawn by the Second District concerning the proper result where value is alleged and proved is not arbitrary and without foundation as contended by Emshwiller, but rather is founded on sound general principles of law.

A plain reading of Florida Statute §812.015 supports the conclusions reached by the Second District below. The Second District correctly determined that no separate crime of "retail theft" of merchandise exists where value is alleged and proved. As aforementioned, no penalty provision is provided in §812.015, nor is any denomination of felony or misdemeanor made in the statute with respect to a first conviction for "retail theft." The only punishment referred to in §812.015 with regard to "theft" is the enhancement provision for additional penalties

upon a second or subsequent conviction for petit theft involving merchandise taken from a merchant. Florida Statute §812.015(2). The only other penalty provision whatsoever in §812.015 relates to a conviction for resisting a reasonable effort of, inter alia, a law enforcement officer, merchant, or merchant's employee to recover merchandise. Florida Statute §812.015(6). The other provisions of §812.015 pertain to the arrest and detention procedures available to a law enforcement officer or a merchant. It is clear that, on its face, §812.015 does not create a separate crime of "retail theft." Rather, the theft of merchandise from a retail establishment is grand theft per §812.014(2)(a) or (b) where the sales price is $100.00 or more. If the sales price is less than $100.00, a petit theft per §812.014(c) has been committed.

ISSUE II

WHETHER A JURY INSTRUCTION BASED ON FLORIDA STATUTE 812.015(1)(c) IS PROPER WHERE THE DEFENDANT IS CHARGED WITH THEFT OF MERCHANDISE.

Emshwiller further contends that the trial court erred by instructing the jury that the value of merchandise means the sales price of the merchandise at the time it was stolen or otherwise removed (R. 69). During the charge conference, defense counsel requested that an instruction be given on fair market value. However, the trial court deemed the retail value instruction to be more appropriate. Emshwiller now contends that the only proper instruction in a case involving the theft of retail merchandise is a fair market value instruction. Support for Emshwiller's proposition can be found in Tobe v. State, supra. However, the Florida District Court of Appeal, Second District expressly disagreed with its sister court and held that a retail value instruction was proper. The Second District decision was correct.

In Emshwiller, the Second District opined:

> Instead of creating a crime of "retail theft" of merchandise by enacting §812.015, we believe the legislature simply provided a set standard by which the market value of property stolen from a retail establishment is determined. In all such cases, a jury search for "market value" need proceed no further than determining sales price of the items stolen at the time of the theft.
> (Text at 346)

The conclusion of the Second District with regard to the proper jury instruction was correct. In fact, the Second District

expressly recognized that sales price is equated with "market value." This Honorable Court has had occasion to consider this issue previously. In Negron v. State, 306 So.2d 104 (Fla. 1975), this Honorable Court was presented with a case in which the only evidence of value presented at trial was the wholesale cost of certain items. This court determined that wholesale cost in and of itself did not establish market value but that sales price would be sufficient:

> . . . At least the evidence should have shown the retail prices of all the allegedly stolen items in order to clearly demonstrate their market value and a salability at that price near the time of the alleged theft.
> (Text at 108-109).

Thus, the legislature by enacting Section 812.015(1)(c) has merely codified a rule previously announced by this Honorable Court. See also Pickles v. State, 313 So.2d 715 (Fla. 1975); State v. Higgins, 437 So.2d 180 (Fla. 4th DCA 1983). Therefore, the trial court did not err by giving the jury instruction based upon Section 812.015(1)(c).

Emshwiller complains of the given jury instruction because he believes, as per Tobe, supra that once sales price is offered at a trial the proof of value is conclusive. Such a contention is in error. Nothing would have precluded Emshwiller from bringing in his own witnesses in order to show that the sales price of the stolen items varied from store to store in the same geographical area so as to permit the jury to make its own determination of the correct sales price of the items.

Additionally, defense counsel sub judice effectively cross-examined the employee of the store from which the goods were taken in an effort to establish a lesser sales price. Thus, an instruction given based upon §812.015(1)(c) does not preclude a defendant from establishing the actual sales price of the items taken.

Inasmuch as Florida case law indicates that the sales price of an item is equated with the fair market value, and inasmuch as the legislature has provided a set standard by which the market value of property stolen from a retail establishment is determined, the giving of a jury instruction based upon §812.015(1)(c) is proper.

CONCLUSION

Based upon the foregoing reasons, arguments and authorities, the decision of the Florida District Court of Appeal, Second District should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, 5100 14th Avenue, North, Clearwater, Florida 33520 on this 27th day of June, 1984.

Of Counsel for Respondent