

64,763

IN THE SUPREME COURT OF FLORIDA

DUDE EMSHWILLER, :  
Petitioner, :  
vs. :  
STATE OF FLORIDA, :  
Respondent :  
\_\_\_\_\_ :

Appeal No. 83-908

**FILED**

SID J. WHITE

JAN 27 1984

CLERK, SUPREME COURT

PETITIONER'S BRIEF ON JURISDICTION

By \_\_\_\_\_  
Chief Deputy Clerk



JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

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\_\_\_\_\_ :

PRELIMINARY STATEMENT

Petitioner, Dude Emshwiller, was the Appellant in the Second District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeals. The appendix to this brief contains a copy of the decision rendered December 28, 1983.

STATEMENT OF THE CASE AND FACTS

In its information the State charged Mr. Emshwiller with retail theft, but listed both the theft statute and retail theft statute, Florida Statutes 812.014 and 812.015, respectively, as having been violated. When the trial court imposed its sentence after the jury found Mr. Emshwiller guilty "as charged," the trial court sentenced Mr. Emshwiller to three years of imprisonment for retail theft, Florida Statute 812.015.

In a supplemental brief to the Second District Court of Appeals Petitioner attacked the judgment and sentence as being void. Mr. Emshiller argued that retail theft was a separate crime from grand theft. Because Mr. Emshwiller was tried and convicted by a Circuit Court for retail theft - a second-degree misdemeanor charge under Florida Statute 812.014(2)(c) - the Circuit Court had no jurisdiction. In addition, the three-year sentence exceeded the maximum sentence allowed for a second-degree misdemeanor. Alternatively, Mr. Emshwiller argued that if he had been actually charged and convicted of grand theft (which was highly suspect), then the jury instructions on retail value were erroneous and entitled Mr. Emshwiller to a new trial. The Second District Court of Appeals rejected Mr. Emshwiller's arguments and held that retail theft is not a separate crime but is part of the theft statute under 812.014. The Second District Court of Appeals also held that a jury instruction of retail value is proper when dealing with retail theft of merchandise.

ARGUMENT

WHETHER THE DECISION IN  
Emshwiller v. State,  
So.2d \_\_\_ (Fla. 2d DCA 1983)  
(Case No. 83-908, opinion  
filed December 28, 1983), IS  
IN CONFLICT WITH THE THIRD  
DISTRICT COURT OF APPEALS?

According to Tobe v. State, 435 So.2d 401 (Fla. 3d DCA 1983), retail theft of merchandise under Florida Statute 812.015 is a separate and distinct crime from grand theft under Florida Statute 812.014. Tobe came to this conclusion on the grounds that "value" needed to convict under the grand theft statute is not "value" needed to convict under the retail theft statute. Tobe then held that retail theft is only a misdemeanor of the second-degree, which is apparently based on the fact that the retail theft statute 812.015 does not carry a penalty but 812.015(2) incorporates 812.014(2)(c) which provides that theft of any property not already listed in (a) or (b) is a second-degree misdemeanor. Because Mr. Emshwiller was charged with retail theft, the Circuit Court which tried and sentenced Mr. Emshwiller lacked jurisdiction over the case and its judgment and sentence is void. See Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981). In addition, the three-year sentence is excessive inasmuch as a second-degree misdemeanor is punishable by a maximum of sixty days. See Florida Statute 775.082(4)(b).

Alternatively, if Mr. Emshwiller's conviction could be sustained as being for grand theft (which is extremely doubtful considering the judgment and sentence's emphasis placed on the retail theft statute), then under Tobe the trial court erred when it instructed the jury on "retail value" under Florida Statute 812.015(1)(c) instead of "market value." Tobe states:

A conviction under the retail theft statute is a misdemeanor of the second degree, while a grand theft conviction is a felony of the third degree. They are separate and distinct crimes imposing separate and distinct sentences. "Value" needed to convict under the grand theft statute is not "value" needed to convict under the retail theft statute. Under the standard instruction for grand theft a jury may find that sale price is or is not fair market value, while under the retail theft statute the jury must find that sale price is equal to "value of merchandise."

The addition of the retail theft statute instruction regarding the definition of value, the central issue of this case, required the jury to find Tobe guilty of grand theft. The additional instruction had the effect of improperly directing a verdict for the state. Because Tobe was not charged with retail or petit theft it was reversible error to instruct the jury on the definition of value contained in the retail theft statute. (Emphasis in original.)

Thus, under Tobe, Mr. Emshwiller would be entitled to a new trial based on the erroneous jury instruction.

In its opinion the Second District Court of Appeals specifically rejected the holdings in Tobe and Mr. Emshwiller's

arguments and acknowledged the conflict between its decision and that in Tobe's. The Second District Court of Appeals rejected the idea that retail theft is a separate crime from grand theft and simply merged retail theft into grand theft, bringing along with the idea of retail grand theft a different standard for proving value; to wit, retail value. In making such findings the Second District Court of Appeals conflicted with the Third District Court of Appeals not only in deciding that there is no separate crime of retail theft but also in finding that "retail value" is an appropriate jury instruction for grand theft cases. Both of the issues went to the heart of Mr. Emshwiller's case. The Second District Court of Appeals erred in its decision and Mr. Emshwiller is entitled to either a new trial or to have his judgment and sentence vacated as void.



CONCLUSION


On the basis of the foregoing authorities and arguments, Petitioner has demonstrated that conflict does exist with the instant decision and the Third District Court of Appeals so as to invoke the discretionary review of the Court.

Respectfully submitted,

  
Deborah K. Brueckheimer  
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert J. Krauss, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Dude Emshwiller, No. 089266, Lake Correctional, PO Box 99, Clermont, FL 32711, this 25<sup>th</sup> day of January, 1984.

  
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