o/a 10-4-84

IN THE SUPREME COURT OF FLORIDA

DUDE EMSHWILLER, :

Petitioner :

vs. : Case No. 64,763

STATE OF FLORIDA, :

Respondent :

:

PETITIONER'S BRIEF ON THE MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX

CITATION OF AUTHORITIES

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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 Appeal. The record on appeal, which was utilized on the District Court level and is contained in one volume, will be referred to by the symbol "R" followed by the appropriate page number.

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 (R4). At trial Francis Ennis and Frank Allen, employees at Albertson's, watched Mr. Emshwiller load sixteen twelve packs of beer and six cartons of cigarettes into a cart, go through the center aisle and proceed out the front door (R31-42). Mr. Emshwiller got into a car but was apprehended shortly thereafter (R34,35).

Store Manager Frank Allen stated that the items taken consisted of sixteen twelve-packs of Budweiser and six cartons of Marlboro cigarettes (R44). He then stated that the beer was on sale for five dollars and thirty-four cents a twelve pack and cigarettes were worth seven dollars and eighty-nine cents for a total value of one hundred twenty-nine dollars and seventy-eight cents (R44). On cross examination it was pointed out that the same beer could vary in price down to four dollars and sixty-nine cents a twelve pack. When after further clarification on the price of a carton of cigarettes, Mr. Allen indicated that he did not know the exact value of a carton of cigarettes at the time of the theft (R45,46).

During the jury instruction conference Mr. Emshwiller objected to the State's request that the jury be instructed as to

the sale price of the item stolen as being the definition of value. Mr. Emshwiller argued that the definition which should be given is that of fair market value. Mr. Emshwiller noted that "if in fact we are dealing with grand theft" then market value is the appropriate instruction. The trial court, however, refused to give the instruction of fair market value and gave the value instruction for retail theft as being the sale price of the merchandise at the time of the taking (R62-67,69). Mr. Emshwiller was convicted as charged and sentenced to three years of imprisonment - the retail theft statute being listed on his sentence (R9-11,17,20).

In a supplemental brief to the Second District Court of Appeals, Petitioner attacked the judgment and sentence as being void. Mr. Emshwiller 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.

ISSUE

DID THE TRIAL COURT ERR IN INSTRUCTING THE JURY ON VALUE FOR RETAIL THEFT INSTEAD OF FAIR MARKET VALUE?

The issue in this particular is really twofold: (1) whether or not there is a separate crime for retail theft, and (2) if not, what is the proper instruction on value in cases involving property with price tags - retail value or fair market value. Each of these issues will be addressed separately.

In regards to whether or not retail theft is a crime separate and apart from grand theft, the court in Tobe v. State, 435 So.2d 401 (Fla. 3d DCA 1983), determined that retail theft of merchandise under Florida Statute 812.015 is a separate and distinct crime from grand theft under Florida Statute 812.014. Tobe reached 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.

In Mr. Emshwiller's case the Second District Court of Appeals did not agree with the Third District Court of Appeals'

reasoning. By examining the legislative history for 812.014 and 812.015, Florida Statute (1981), from 1973 to the present, the Second District Court of Appeals reached the conclusion that no separate crime of retail theft was ever created. The Second District Court of Appeals' conclusions, however, are contradictory in nature.

Tracing the history of grand theft and retail theft, one can start in 1973 where Larceny was defined and penalties imposed in 812.021, Florida Statute (1973), and provisions for arresting shoplifters without a warrant by officers and merchants were made in 812.022, Florida Statute (1973). "Value" in larceny was not defined except to say that stolen property with the value of one hundred dollars or more constituted grand larceny and a third-degree felony while stolen property of a value of less than one hundred dollars would constitute a petit larceny and a second-degree misdemeanor. The taking of unpurchased merchandise from a mercantile establishment was included in the larceny statute, 811.021(1)(d) Florida Statute (1973), with no special provisions as to how to determine value. The arrest for shoplifting provision in 811.022 covered strictly arresting procedures and nothing more. In 1974 a few changes were made: Chapter 811 became 812; 812.011(2) defined "value" as equaling "fair market value of property"; and 811.022 (1973) was moved to 901.34 (1974) in toto. The taking of unpurchased merchandise

from a mercantile establishment was still covered under the larceny section [now changed to 812.021(1)(d) (1974)] with no special provision as to how to determine value.

In 1975 901.34 was amended. The caption of "Shoplifting" was changed to "Retail theft" and a provision for making the resisting of arrest in such shop cases was made a crime - 901.34(4) (1975). In 1977 several major changes were made. "Value" was still defined in 812.011(2) as being the fair market value; but this definition was expounded upon in 812.012(9) as being the market value at the time and place of the offense or, if such was impossible to ascertain, then value would be the cost of replacement within a reasonable time after the offense. "Larceny," however, now became separate from "theft," with theft defined in 812.014 and larceny in 812.021 - larceny still including the taking of unpurchased merchandise. The 1977 Statutes also repealed the larceny section effective October 1, 1977.

To apparently compensate for the loss of 812.021, 812.015 was created in 1978. Although 901.34 was repealed also in 1978, it appears that parts of 812.021 were put together with 901.34 to compose 812.015. For example 812.021(1)(d) (1977) became 812.015(2) (1978), although much enlarged in scope in the 1978 version. In 812.015 (1978) the statute describes "retail theft" in a manner similar to 812.021(1)(d) (1977). Section

812.015(1)(c) defined "Value of merchandise" as being sale value and Section 812.015(2) provided a penalty for the second or subsequent conviction for petit theft involving retail theft.

In the 1983 version of the theft chapter, 812.012 (1983) still defines value as the market value or, if not possible to ascertain, the replacement cost at or about the time of the offense. Section 812.014 remained basically, for our purposes, the same; and Section 812.015 added farm theft to the retail theft provisions.

It is obvious that Section 812.015 is more than just a list of definitions. Bits and pieces of the old larceny statute that the legislature did not want absorbed into the theft section of 812.014 were put into 812.015 and combined with the arrest provisions for retail theft. "Retail theft" and "value of merchandise" were described and a punishment for second and subsequent convictions for "petit theft" involving retail theft was specifically provided. The fact that the statute does not provide a penalty for first convictions may be an oversight or it may be that the legislature intended 812.014(2)(c) to apply. Section 812.015(2) refers to 812.014(2)(c) but then adds a fine for the second and subsequent convictions. In addition, Section 812.014(2)(c) is for "petit theft" convictions and Section 812.015(2) describes theft involving merchandise as petit theft by stating: "Upon a second or subsequent conviction for petit theft involving merchandise. ..."

As pointed out in Tobe, supra, "value" for retail theft is vastly different from "value" for grand theft. Retail value is an inflated figure that differs greatly depending on the store, the location of the store, and whether or not the store is having a sale. In addition, retail value under Section 812.015(1)(c), Florida Statute (1983), is easy for the State to prove and impossible for a defendant to question. Under such circumstances, retail theft should be considered its own crime punishable as a second-degree misdemeanor.

As pointed out above, the fact that the Second District Court of Appeals reached a different conclusion in examining the legislative history of the theft, larceny and retail theft statutes is contradictory in nature. At the conclusion of Mr. Emshwiller's opinion, the Second District Court of Appeal stated:

> The issue is not before us here, but we conclude that a charge could be made under section 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. In that instance, the offense would be a misdemeanor of the second degree pursuant to section 812.014(2)(c).

Emshwiller v. State, 443 So.2d 343 at 346 (Fla. 2d DCA 1983). Obviously, the Second District Court of Appeals considered Section 812.015(1)(d) a separate crime if value was not alleged

or proved. If, however, Section 812.015(1)(d) is not a separate offense for taking away property, then why should it create separate crimes of altering or removing tags and transferring merchandise to different containers? In addition, case law is replete with the fact that the taking of any property is worth something and constitutes a petit theft if no value is ever proved. This concept was incorporated into 812.014(2)(c). Thus, the Second District Court of Appeals applied Section 812.014(2)(c) to part of Section 812.015(1)(d) but not all of the section. Such distinctions appear to be arbitrary and without foundation. Section 812.015(1)(d) should be given the same interpretation in its entirety. The Second District Court of Appeals failed to uniformly apply one rule to Section 812.015(1)(d), thus, the Second District Court of Appeal's interpretation of retail theft is fatally flawed and cannot stand.

In Parker v. State, 406 So.2d 1089 (Fla. 1981), this Honorable Court stated that one indicator of the legislature's intent is the title of the law enacting the statute. The title creating Section 812.015 (1978) is found in Chapter 78-348, Laws of Florida, and reads as follows:

> An Act relating to theft; amending s. 812.014(1), Florida Statutes, clarifying the legislature's intent requiring knowledge as an element of theft; adding paragraph (d) to s. 812.014(2), Florida Statutes, requiring a written judgment and

> fingerprints in the record of judgment of guilty of petit theft; providing for admissibility as evidence; creating s. 812.015, Florida Statutes, providing definitions; providing minimum penalties for second convictions for certain theft; transferring s. 901.34, Florida Statutes, provisions relating to detention and arrest of persons by merchants or their employees or by peace officers; repealing s. 901.34, Florida Statutes, to conform to the act; providing an effective date.

The title states that it is creating definitions and penalties for second convictions for "certain theft." The "certain theft" is, of course, the theft created and defined in 812.015. Combine this with the statutory title of "Retail theft" and the history of the applicable statues and one has a new crime - retail theft. If the statute and its legislative history is not quite so clear to this court, then Florida Statute 775.021 Rules of Construction should apply. According to this section, statutory language for penal statutes must be strictly construed; and if the language is susceptible of differing constructions, it shall be construed most favorably to the accused. In the case of retail theft, the most unambiguous construction and/or the construction most favorable to the accused is the interpretation given in Tobe, supra. Retail theft, with its arbitrary and extremely easy way of establishing retail value, is a second-degree misdemeanor and is a crime separate and distinct from grand theft.

If this court agrees with the above-stated proposition, then the Circuit Court, which tried, convicted and sentenced Mr.

Emshwiller for retail theft, 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 the second-degree misdemeanor is punishable by a maximum of sixty days. See Florida Statute 775.082(4)(b). If, on the other hand, this court finds that retail theft is only a part of grand theft and not a new crime, then the question now becomes what is the proper jury instruction as to value involving retail theft.

In Tobe, supra at 402, the court pointed out the difference between "value" for grand theft cases and "value" for retail theft cases:

> "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 statue 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.
> (Emphasis in original.)

In Emshwiller, supra, the court stated that in cases involving merchandise a jury's search for value need not proceed further than determining the sale price of the items stolen at the time

of the theft. The Second District Court of Appeals' viewpoint, however, ignores the fact that under the retail value definition the jury must find that the sale price is the value of merchandise and that the accused has no way of trying to attack the particular store's ticket price for the day of the theft. The Second District Court of Appeals' viewpoint improperly directs a verdict for the State on the essential element of proving value over one hundred dollars in grand theft cases and takes away from the accused any possible defense or attacks on the issue of value.

Other states have addressed the issue of value in regards to ticket/sale prices of merchandise. In State v. Coleman, 19 Wash.App. 549, 576 P.2d 925 (Div.1 App. 1978), the court stated that the proper standard for assessing value in cases involving store merchandise was "market value." The court then defined market value "as the price which a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction." Coleman, id. at 926. The only evidence of value of the stolen items in Coleman was the price tags on the merchandise. The court held that these price tags, by themselves and with no testimony from a qualified witness regarding accuracy or indicia of market value, could not be used to establish value. The court pointed out that the defendant could not cross examine price tags to determine, for example, whether or not the

merchandise might have been one day from a bargain basement, a sale, or disposal in favor of newer styles or seasonal changes. Thus, the price tags could not be used to independently place a value on the goods in question, there was no other evidence of value, and the defendant was entitled to a discharge on the grand theft conviction with a petit theft conviction to be instituted in its stead.

In Minnesota the legislature has specifically defined "value" as the retail market value at the time of the theft, Section 609.52, Minn. Stat. Ann. (1984). The Minnesota courts, however, have specifically held that price tags are not conclusive proof of value. These cases allow a defendant to introduce direct and circumstantial bearing on the value of the item in the retail market and allow a defendant to call other witnesses to testify that other stores sell the item for less. See State v. McDonald, 251 N.W. 2d 705 (Minn. 1977); and State v. Ferraro, 290 N.W.2d 177 (Minn. 1980).

In Arizona fair market value is the test for value of merchandise, but retail price is not equated with fair market value. The courts have determined that while the retail price of stolen goods is admissible to show value, the wholesale price is also admissible to help establish a range (by experts, if necessary), within which a jury may find fair market value. See State v. Randle, 2 Ariz. App. 569, 410 P.2d 687 (Ct. App. 1966); and State v. Sorrell, 95 Ariz. 220, 388 P.2d 429 (1964).

Similarly, in Wisconsin value is "fair market value" based on a prudent seller and prudent buyer selling and buying when not compelled to do so. This definition, the courts state, is not necessarily either the wholesale or retail value, but rather those prices set the outer limits within which the market value can be found. See Sartin v. State, 170 N.W.2d 727 (Wisc. 1969).

The sum and substance of the above State definitions and interpretations of "value" is that fair market value is still a valid definition when applied to retail goods. Price tags, in and of themselves, are not conclusive proof of value nor should they be used as such inasmuch as it is impossible to cross examine and attack the validity of price tags when the only evidence is the price tags. Retail value should be open to attack even where, as in Minnesota, the legislature steps in and defines value as being retail value.

In Mr. Emshwiller's case the jury instruction on value was far too limiting and narrow. The "retail value" was given as a mandatory value and fair market value as an instruction was refused. The fair market value instruction should not be thrown out whenever store merchandise is involved. At the most it is still a vital definition that can be used under any situation, and at the least it can be combined with retail and wholesale values so that the jury can determine value with the assistance of these as outer limits. Mr. Emshwiller, if not entitled to a

discharge on the grand theft charge is entitled to a new trial with a better jury instruction on "value" - be it a fair market value instruction or a new hybrid instruction encompassing retail and wholesale values in addition to fair market value.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Second District Court of Appeals' decision in Mr. Emshwiller's case should be reversed, and Mr. Emshwiller should either be discharged on the grand theft conviction or be given a new trial.

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, this 7th day of June, 1984.

Deborah K. Brueckheimer
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