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IN THE SUPREME COURT OF FLORIDA

GEORGE WICKER, JR., :
Petitioner, :
vs. : Case No. 64,958
STATE OF FLORIDA, :
Respondent :
_____ :

PRELIMINARY STATEMENT

Petitioner, George Wicker, Jr., was the Appellant in the District Court of Appeal, Second District, and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the District Court of Appeal, Second District. The appendix to this brief contains a copy of the decision rendered November 4, 1983, and amended February 8, 1984 on motion for rehearing.

STATEMENT OF THE CASE AND FACTS

Petitioner was charged with Burglary assault contrary to Florida Statute 810.02(2), Sexual Battery contrary to Florida Statute 794.011, and Robbery contrary to Florida Statute 812.13. After a jury trial, Petitioner was found guilty as charged and sentenced by the trial court.

In its brief Petitioner attacked the trial court's failure to grant Petitioner's Motion to Dismiss the burglary assault count of the information, claiming that the information was deficient in that the elements of the alleged assault were not stated in the charging document. The Second District Court of Appeals, however, rejected Petitioner's argument and stated that an information need not plead all of the elements of the enhancing crime for burglary under Florida Statute 810.02(2). The burglary assault conviction was upheld in the case.

ARGUMENT

WHETHER THE DECISION IN
WICKER v. STATE, So.2d
Fla. 2d DCA 1983 (Case No.
83-246, opinion filed
November 4, 1983), IS IN
CONFLICT WITH OTHER DISTRICT
COURT CASES?

In holding that an information need not plead all of the elements of the enhancing crime for burglary under Florida Statute 810.02(2), the Second District Court of Appeals specifically disagreed with the holding in Lindsey v. State, 416 So.2d 471 (Fla. 4th DCA 1982). In Lindsey the court held that an information charging assault as an aggravating factor in a burglary charge must contain the elements of assault even though the assault is an aggravating factor rather than the direct charge.

Lindsey can be distinguished from State v. Waters, So.2d (Fla. 1983) (Case No. 61,036, opinion filed July 28, 1983), 8 F.L.W. 286, which held that an information charging burglary need not specify the offense the accused is alleged to have intended to commit. The reason Lindsey can be distinguished is because the State need only prove that the defendant had the intent to commit a specific crime while inside the structure, and it is not necessary to prove the crime was actually committed. However, in a case where burglary is being enhanced with an aggravating factor, the State must prove that the aggravating factor occurred.

Under Lindsey Petitioner is entitled to have his burglary assault conviction overturned with directions to enter a judgment and sentence for a conviction of second-degree burglary.

CONCLUSION

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

Respectfully submitted,

Allyn Giambalvo

Allyn Giambalvo
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert J. Landry, Assistant Public Defender, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to George Wicker, No. 088158, Florida State Prison, PO Box 747, Starke, FL 32091, this 8th day of March, 1984.

Allyn Giambalvo

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