IN THE SUPREME COURT OF FLORIDA

GEORGE, WICKER, JR., :

Petitioner, :

vs. : Case No. 64-958

STATE OF FLORIDA, :

Respondent. :

_____ :



**PETITIONER'S BRIEF ON MERIT**

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

By: Deborah K. Brueckheimer
Assistant Public Defender
Criminal Courts Complex
5100 - 144th Avenue North
Clearwater, Florida 33520

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## PRELIMINARY STATEMENT

Petitioner, George Wicker, Jr., 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 three volumes, will be referred to by the symbol "R" followed by the appropriate page number.

## STATEMENT OF THE CASE

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 (R28,29). All of said offenses allegedly occurred on November 15, 1981 (R28,29). Prior to trial Petitioner made a Motion to Dismiss or Strike Count I of the information in that Count I failed to allege the essential elements of assault or provide specifics as to the assault (R16,17). The information merely alleged that during the course of the burglary, George Wicker, Jr., committed "an assault upon Elouise Rubin" (R28,29). Because the information failed to allege the elements of the assault in question or provide specific facts as to the assault, Mr. Wicker argued that the factors elevating the burglary to a life felony were vague and hindered him in his ability to prepare for trial (R16,17). After hearing the motion, the trial court denied the motion (R24).

In his brief to the Second District Court of Appeal Mr. Wicker attacked the trial court's failure to grant his 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 Appeal, however, rejected Mr. Wicker'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. The Second District Court of Appeal, however, did set aside the sexual battery conviction, finding that the sexual battery was the assault in the burglary assault charge; and Mr. Wicker could not be convicted of both burglary assault and sexual battery in such case.

## STATEMENT OF THE FACTS

Petitioner, George Wicker, Jr., was charged with Burglary Assault, a Sexual Battery and Robbery. At trial on these charges the victim testified as follows:

Elouise Rubin, age twenty-nine, testified that on November 15, 1981, she was in her apartment at 1672-13th Avenue South (R64). Sometime in the evening after 8:00 p.m. she fed her children, put them to bed and lay down to watch T.V. for awhile (R66). After falling asleep, she was awakened in the middle of the night by someone sitting on the couch and putting their hand over her mouth. The man told her to be quiet and not to scream or she would be killed. She stated that there was also someone in the bedroom with the kids and she was told if she screamed or moved they would shoot the children also (R67).

She was asked if she had any money. She couldn't say anything because of the hand over her mouth so she held up her left hand and motioned with her five fingers three times that she had fifteen dollars (R68). All the lights in the house were off, although she had left the lights on before falling asleep (R69).

After telling her to be quiet, the heavier of the two men turned to the other whom he referred to as "Willie" and whispered something in his ear. "Willie" told her to be still and he proceeded to pull off her underwear (R70). The heavy set man then proceeded to have intercourse with her (R71). When he

finished he pulled something down over her face which she later found out was a curtain. He also told her to put her hand on his back and not to touch his hair, although she determined that his hair was either plaited or tightly curled (R72). With the curtain over her face, "Willie" got on top of her. The heavier man went to the bathroom and turned on the light. She lifted the curtain up just enough to see from underneath as the heavy set man was wiping himself off (R73). When "Willie" finished having intercourse with her, the heavy set man turned off the bathroom light. Then they threw a heavier item over her head which she found out later was her coat.

They told her to count to a hundred and not to move or she would be killed (R74). After hearing them leave she counted a little longer and then ran across the street to her landlord to report the incident (R75). Subsequently, she determined that her purse containing food stamps and fifteen dollars had been taken (R76).

## ARGUMENT

DID THE SECOND DISTRICT COURT OF APPEALS ERR IN HOLDING THAT THE INFORMATION IN PETITIONER'S CASE NEED NOT ALLEGE ALL OF THE ELEMENTS OF ASSAULT FOR THE BURGLARY ASSAULT COUNT?

When the Second District Court of Appeal issued its opinion in Mr. Wicker's case, it specifically found that informations need not plead all of the elements of the enhancing crime under section 810.02(2), Florida Statute (1981), of the burglary statute. In reaching this conclusion, the Second District Court of Appeals specifically disagreed with the decision 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.

This Honorable Court reviewed the Lindsey decision in State v. Lindsey, 446 So.2d 1074 (Fla. 1984). Although this court overruled the Fourth District Court of Appeal, it noted that Lindsey's case did not come under any of the problems outlined in State v. Dilworth, 397 So.2d 292 (Fla. 1981). In Dilworth, id. at 293, this court stated:

> An information must be quashed for vagueness on a motion to dismiss only if it is "so vague, indistinct and indefinite as to mislead the accused and

> embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense."

In Lindsey the facts in the case were such to clearly show the assault on the burglary victim: she was bound, gagged and had her leg cut with a knife. This was in addition to the robbery with a weapon charge in which the same victim was threatened to have her finger cut off if she did not remover her ring. Mr. Lindsey did not complain about vagueness in regards to the burglary assault conviction, but simply argued that an information is completely void if it does not allege the elements of assault in a charge of burglary assault. This court rejected such an argument. Under this court's holding in Lindsey, therefore, an information which does not allege the elements of assault in a burglary assault charge is not fatally defective unless the information is so vague or indefinite as to mislead the accused and embarrass him in the preparation of his cases or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense. Dilworth, supra.

The exception referred to in this court's decision in Lindsey applies to Mr. Wicker's case. Even though the Second District Court of Appeals refused to strike the conviction for burglary assault, it did set aside the sexual battery conviction. Stating that it was clear from the entire information that the sexual battery was the assault in the burglary assault charge, the

Second District Court of Appeal held that Mr. Wicker could not be convicted of both burglary assault and the sexual battery which formed the basis of the burglary assault charge. [1] Because the Second District Court of Appeal found the sexual battery charge to be the assault in the burglary assault conviction and the State argued that the assault was not the sexual battery in its Motion for Rehearing as per the information which only alleged "assault" (although the State failed to set forth facts showing an assault besides the sexual battery occurred), it is obvious that the information is so vague and indefinite as to have mislead Mr. Wicker and exposed him to prosecution for the same offense; i.e., burglary assault and sexual battery convictions and a dispute as to whether or not the sexual battery was the assault referred to in the burglary assault charge.

The facts in Mr. Wicker's case are not as clear cut as those set forth in Lindsey. In Mr. Wicker's case the assault upon the victim centers around the sexual battery. Inasmuch as the State failed to allege specific facts or elements of the assault in the burglary assault charge that would distinguish the assault in the burglary sufficiently from the sexual battery, the burglary assault charge fails under Dilworth. It is either possible that Mr. Wicker was convicted twice for the same crime (being argued in Case No. 64,985) or exactly what constitutes the assault is so vague as to have confused not only Mr. Wicker, but the Second

1. Whether or not the sexual battery conviction should have been thrown out by the Second District Court of Appeals is presently before this court in State v. Wicker, Case No. 64,985.

District Court of Appeal and the State. Because of either the confusion or the double convictions, the judgment and sentence in the burglary assault charge must be reversed and remanded to the trial court with directions to enter a judgment for conviction of second-degree burglary and to resentence Mr. Wicker accordingly.

## CONCLUSION

In light of the foregoing reasons, arguments and authorities, the Second District Court of Appeal's decision in Mr. Wicker's case upholding the burglary assault conviction should be reversed; and a judgment and sentence should be entered convicting Mr. Wicker of second-degree burglary.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 24th day of July, 1984.

Respectfully submitted,

Deborah K. Brueckheimer

Deborah K. Brueckheimer
Assistant Public Defender