IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : CASE NO. 64,977

McKINLEY O'NEAL, :

Respondent. :

FILED
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ANSWER BRIEF OF RESPONDENT

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:

ANSWER BRIEF OF RESPONDENT

I PRELIMINARY STATEMENT

Respondent will refer to the record of documents by use of the symbol "R", and to the transcript of proceedings by the symbol "TR".

The District Court's opinion in this case is almost identical to State v. Donald, Case No. 64,652, and is based on State v. Phillips, Case No. 64,647. Both Phillips and Donald are now pending in this Court on certified questions from the First District Court of Appeal. The opinions of the District Court in Donald and Phillips are contained in an appendix which will be referred to as "APP".[1]

1. The state's brief contends that "[t]he instant certified question is substantially more narrow than the related question certified to this Court in Donald v. State . . . ." (Brief of Petitioner, 19, 20 n. 8.) Respondent disagrees. The question certified here is exactly the same as Donald. See App. at B-1.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the petitioner's statement of the case and facts as being substantially accurate with the following exceptions.

1. The state incorrectly referred to respondent as the petitioner throughout the statement.

2. The transcript of prior convictions (R-21-31) was apparently filed as part of the state's Notice of Intent to Seek Felony Petit Theft Sentence (R-19) and was not attached to respondent's motion to dismiss (p. 4, Brief of Petitioner). (It is not entirely clear whose motion the state referred to because petitioner and respondent are consistently transposed.)

3. The claim that reversal of this case was predicated upon Phillips [v. State, 438 So.2d 886 (Fla. 1st DCA 1983)] and Pickelsimer [v. State, 440 So.2d 47 (Fla. 1st DCA 1983)] is inaccurate insofar as the reference to Pickelsimer is concerned. The District Court's opinion did not cite Pickelsimer.

III ARGUMENT

ISSUE

WHETHER THE DISTRICT COURT PROPERLY HELD THAT RESPONDENT'S CONVICTION FOR FELONY PETIT THEFT COULD NOT BE SUSTAINED BECAUSE THE INFORMATION DID NOT ALLEGE THE ESSENTIAL ELEMENTS OF FELONY PETIT THEFT.

The question is whether the information was defective for omitting an essential element, the fact of prior convictions. The answer to this question is virtually self-evident from the statute[2] which created felony petit theft as an offense. It states, in part:

> Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree . . . (Emphasis added)

In State v. Harris, 356 So.2d 315, 317 (Fla. 1978), this Court explicitly held that prior convictions were an element of the offense, stating:

> We therefore hold that Section 812.021 (3) [identical in material respects to § 812.014(2)(c)] creates a substantive offense to be tried in the circuit court when felony petit larceny is charged, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge. (Emphasis added)

Earlier decisions in second offender prosecutions required the state to allege, and the jury to find guilt of, both the historical fact of prior convictions and the currently charged offense. State ex rel. Lockmiller v. Mayo, 88 Fla. 96, 101 So. 228 (1924); Barnhill v. State, 41 So.2d 329 (Fla. 1949);

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2. Section 812.014(2)(c), Fla. Stat.

Nichols v. State, 231 So.2d 526 (Fla. 2nd DCA 1970). In Harris, the Court considered whether the procedure whereby the jury was told of the prior convictions would unduly burden the constitutional presumption of innocence, especially when the prior offense was a "similar, related offense". To protect the defendant's rights to due process, the Court directed that the fact of prior convictions not be brought to the "attention of the jury" but instead be adjudicated by the trial judge using the procedures for enhanced sentences in § 775.084, Fla. Stat.

The Court expressly overruled Nichols v. State, supra,[3] "to the extent it conflicts" with Shargaa v. State, 102 So.2d 809 (Fla. 1958). However, the only "conflict" disapproved in Harris was Nichols' provision that the jury be the trier of fact as to the prior convictions. The Court did not, expressly or by implication, hold that the charging document could omit the prior offenses relied upon as essential elements of the charge.

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3. In Nichols, the Second District relied upon the Supreme Court decision in Barnhill v. State, supra, which was presumably also overruled sub silentio.

That is why Nichols was not overruled in toto.[4] It is still necessary to allege prior convictions used as support for elevating a misdemeanor offense to a felony. This principle, derived from State ex rel Lockmiller v. Mayo, supra, at 88 Fla. at 98, 99, and

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4. Assessing the inconsistency between Shargaa and Nichols is difficult because of the different situations presented in each case. In Shargaa, the defendant was prosecuted for larceny while being simultaneously accused and tried as an habitual offender because of a prior conviction for issuing a worthless check. This Court held that this procedure unfairly infringed on the defendant's right to a fair trial on the larceny charge, of which a prior conviction was not an element. The state should have prosecuted the larceny without referring to prior offenses, and, if a conviction were obtained, then proceeded against the defendant as an habitual offender in another trial.

   Nichols, on the other hand, was a prosecution for a second offense against the beverage law. Unlike Shargaa, but similar to the situation in Harris, proof of a previous conviction was an essential element of the offense being tried. The decisions of this Court upon which Nichols relied squarely held that a prior conviction was an essential element to be alleged and proved at trial. See Lockmiller, supra; Barnhill, supra. Although in Harris the Court overruled Nichols to the extent of any inconsistency with Shargaa, it did not at the same time overrule Lockmiller or Barnhill; nor had the Court in Shargaa overruled those earlier decisions.

   The question that remains is whether a defendant may be deprived of the right to a jury trial on the element of prior convictions. Lockmiller holds that the defendant has a right to a jury determination on the historical fact of prior convictions which are elements of the crime. Cf. Barton v. State, 291 So.2d 586 (Fla. 1974). In the analogous situation of possession of a firearm by a convicted felon, the Court has held that the prior conviction is a substantive element to be alleged and that proof of the conviction may be offered to the jury unless its probative value is substantially outweighed by the danger of unfair prejudice. Parker v. State, 408 So.2d 1037 (Fla. 1982); State v. Vazquez, 419 So.2d 1088(Fla. 1982).

   Since in Harris the Court found it inevitable that unfair prejudice would result from disclosure of the prior similar offenses, a procedure was mandated for a determination of the historical fact of prior convictions in a separate, non-jury proceeding. As an alternative, the defendant might be given the option of waiving jury trial on the prior convictions. Without this option, the defendant is deprived of the right to have a jury determine all the issues of guilt, unless, of course, the statute is inherently unconstitutional.

quoted below, was not impaired or altered by Harris:

> Under Section 5486, supra, a first offense was declared to be a misdemeanor and a second offense against the provisions of the article was declared to be a felony. Whether the Section sought to prescribe merely an increased punishment for habitual offenders or create a new offense, a felony, for a second violation of the Act, the allegation of prior conviction was a necessary element in the so-called felony. (Emphasis added).

With this as a background to Harris, it is an unwarranted supposition for the state to argue that Harris "specifically disavows the procedure . . . whereby specific information concerning prior convictions is contained within the charging document." The state incorrectly equates the prohibition against prejudicial disclosures to the jury with the persisting requirement that the information contain all the essential elements of the offense.[5] Harris does not, as claimed here by the state, specifically disavow that prior offenses are elements of the offense which must be alleged. Rather, it is clear that Harris adopted the state's argument there that the prior offenses are elements which "must be specifically alleged." Id., at 315.

The state's argument continues by urging that in any event

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5. The Court in Harris was implying the exact result reached by the First District in Donaldson v. State, 356 So.2d 351 (Fla. 1st DCA 1978), which held that Fla.R.Cr.P. 3.400 authorizes but does not require the jury to take a copy of the information to the jury room. In a felony petit theft prosecution, the jury would not be given a copy of the information, thereby harmonizing the requirement of alleging the essential element of prior convictions with maintaining the defendant's right to a fair trial.

felony petit theft was sufficiently alleged because (1) the caption labeled the count "felony petit theft"; (2) the text of the information cited Section 812.014(2)(c) which "pertains" to felony petit theft; and (3) the "imperfect" information was bolstered by the Notice of Intent to Seek Felony Petit Theft Penalty based upon two prior theft convictions.

The "caption" and "notice" arguments are both refuted by State v. Black, 385 So.2d 1372 (Fla. 1980), where the Court held an indictment fatally deficient when it failed to allege the place the crime occurred even though the caption named the Circuit Court for Hernando County. This Court said the caption notwithstanding the "body of the indictment did not contain a statement as to the place of the alleged crime." Id., at 1374. Nor was this deficiency sufficiently ameliorated by the bill of particulars giving "an exact address in Hernando County" or by repeating that address in a demand for notice of alibi. Ibid. Those documents, analogous to the type of notice relied on here by the state and by Judge Wentworth dissenting, in Phillips v. State, 438 So.2d 886 (Fla. 1st DCA 1983) did not overcome the requirement that all essential elements be alleged in the body of the charging document. As this Court said in Black:

> It is true that the availability of a statement of particulars and Florida's liberal discovery rules allow an accused more leeway to prepare a defense than did the common law 'four corners of the indictment' rule; but it is equally certain that a statement of particulars cannot cure fundamental defects in an indictment.
>
> 385 So.2d 1375.

As for citing the statute to cure the lack of pleading the

prior offenses, the state's own argument confesses its weakness. Section 812.014(2)(c) does not invariably charge felony petit theft. Perhaps that is why the state says the statute "pertains" to felony petit theft. True, but it also "pertains" to second-degree misdemeanor petit theft, and to second-conviction, first-degree misdemeanor petit theft. So while the statute pertains to felony petit theft, it does not do so exclusively, thereby nullifying any argument that citing to or by reference incorporating the statute cures the absence of essential elements. On the contrary, combining the allegation of theft of merchandise valued at <u>less than $100</u> with the cited statute readily leads to the conclusion that the crime charged is a second-degree misdemeanor. Only if prior offenses were alleged would the information charge a felony.

Section 814.012(c) proscribes three separate offenses, which are first-degree and second-degree misdemeanor petit theft and felony petit theft. The felony portion is not merely an enhancement as in the habitual offender statute, § 775.084. The words this Court used in <u>Harris</u> make clear that felony petit theft is a separate offense:

> Section 812.021(3) provides in pertinent part, that <u>upon the third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree (rather than a misdemeanor in the second degree). This statute creates a substantive offense and is thus distinguish able from Section 775.084, the habitual criminal offender statute</u>. (Emphasis added)
>
> 356 So.2d at 316

Being a substantive offense, felony petit theft has as its essential elements all those required for petit theft <u>plus</u> two

prior convictions. Were it otherwise, this Court would not have said in Harris that felony petit theft is a substantive offense rather than an enhancement. Being a substantive offense distinct from misdemeanor petit theft, the distinguishing element is prior convictions. By not alleging priors, the misdemeanor and felony portions would be the same offense, but with an enhanced penalty for third and subsequent offenders; yet Harris expressly rejected that analysis. Since, therefore, prior offenses are elements of the offense and not merely elements of the penalty, those elements must be stated in the charging document.

The information here did not allege felony petit theft because it omitted the essential elements which distinguish that substantive offense from the separate substantive offense of misdemeanor petit theft.

State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1978) is not on point. Unlike the charge here, Cadieu's information alleged all the essential elements of the crime of lewd assault on a minor; its flaw was in not alleging the particular acts charged. Cadieu moved to dismiss the information after trial but not before trial. The test applied to a post-trial motion was whether the information is so defective it would not support a conviction, as oppsed to the pretrial standard of whether the information gave notice of the particular acts. In this context, the First District said that the information was not so defective as to fail to support a conviction. It was "cast in the statutory language" (meaning it alleged all the elements) but was imperfect for lack of allegations of fact. This did not render the information void. The Court said:

> When confronted with an information that is defective only in failing to charge particulars within a generic statutory description of proscribed conduct, the accused must either challenge the information by motion, thus providing opportunity for a new and curative information, or be satisfied with resolving his doubts by discovery and a motion for statement of particulars.
>
> 353 So.2d at 151.

Because the information in Cadieu did not omit essential elements, the rationale of that case is not germain here. Had Cadieu been decisive, surely Judge Smith, who wrote the majority opinions in both Cadieu and Phillips, would have recognized the similarities.

Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982) rev. den. 424 So.2d 761 cannot support the state's position. The Fifth District's ruling in Jones was that although non-consent to entry was an essential element in a burglary prosecution, that defect was waived by lack of a timely motion when the information cited the proper statute and the statute recited the missing element. Jones relied upon Hicks v. State, 407 So.2d 252 (Fla. 5th DCA 1981) for its holding that non-consent was an essential element. Hicks was reversed on that point by this Court. State v. Hicks, 421 So.2d 510 (Fla. 1982). Because the major premise of Jones was wrong, its ultimate conclusion is also wrong. But the two errors cancelled each other out, so the decision affirming the conviction turned out to be the correct result and for that reason it was not necessary for discretionary review to be granted in Jones. In retrospect Jones is a decision which reached the right result for

the wrong reason. The conviction was properly affirmed not because failure to allege an essential element was waived but because the element was not essential.

Alleging essential elements is necessary for two separate reasons. One is the due process right not to be convicted of a charge "that was never made." Cole v. Arkansas, 333 U.S. 196, 201 (1948). The failure to allege the essential elements of an offense renders any subsequent conviction invalid. This principle was reiterated by this Court in State v. Gray, 335 So.2d 816, 818 (Fla. 1983), as follows:

> . . . conviction on a charge not made by the indictment or information is a denial of due process of law. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). If the charging instrument completely fails to charge a crime, therefore, a conviction thereon violates due process. Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state. Since a conviction cannot rest upon such an indictment or information, the complete failure of an accusatory instrument to charge a crime is a defect that can be raised at any time - before trial, after trial, on appeal, or by habeas corpus.
>
> (Emphasis added)

A second error resulting from not alleging priors was lack of subject matter jurisdiction in the circuit court. This is primarily the ground relied upon by the District Court in Phillips, supra. Ample precedent supports its position.

Circuit court jurisdiction over crimes is limited to felonies and to misdemeanors arising out of the same circumstances

as a felony which is also charged; jurisdiction over all other misdemeanors is in the county court. Art. V, Section 5(b), 6(d), and 20(c), Fla. Const.; Sections 26.012(2)(d) and 34.01(1)(a), Fla. Stat. A circuit court could not acquire jurisdiction over the misdemeanor of petit theft unless it were joined with a felony count arising from the same circumstances, which in this case it was not.

In Pope v. State, 268 So.2d 173 (Fla. 2nd DCA 1972) cert. discharged, 283 So.2d 99, the state alleged in an information filed in circuit court that the defendant possessed marijuana without additionally alleging whether the defendant had a prior conviction for that offense or possessed more than 5 grams. First-time possession of less than 5 grams of marijuana was a misdemeanor under the law then in effect, § 404.15, Fla. Stat. (1971). The Court held that without allegations of either a prior conviction or possession of more than 5 grams the information failed to charge a felony; the ensuing judgment and sentence imposed by the circuit court were void because:

> . . . such allegation is essential to the invocation of the jurisdiction of a felony court over the charge since the allegata of the accusatory writ are precisely the basis in the first instance upon which the court's jurisdiction over the subject matter thereof is predicated. Neither is alleged here and consequently the circuit court, which has felony jurisdiction only, did not acquire jurisdiction of the subject matter. Its judgments in the premises are therefore void. (Emphasis added) (footnotes omitted).
>
> 268 So.2d at 175.

In Brehm v. State, 427 So.2d 825 (Fla. 3rd DCA 1983), the defenant was charged with and convicted of ten counts of tampering

with a parking meter in violation of § 877.08, Fla. Stat. As in petit theft, only subsequent offenses are felonies.[6] After finding guilt, the trial court adjudicated and sentenced the defendant as a felon because of previous convictions of the same offense. The Third District Court found the judgments and sentences void because:

> The information charging the defendant with the violation of Section 877.08 failed to allege that the defendant had a prior conviction of the same offense. Consequently, the defendant could only have been guilty of a misdemeanor, over which the circuit court does not have jurisdiction. (Emphasis added)
>
> 427 So.2d at 826.

In a footnote to that passage, which cited Harris, the Court said that, had the prior conviction "been properly pled," it would not have been brought to the jury's attention but determined in a post-verdict proceeding. Ibid.

Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981), held that allegations of theft of merchandise valued at less than one hundred dollars in an information captioned "Grand Theft," even when supplemented by a notice of intent to prosecute as a subsequent offender under § 812.014(2)(c), were insufficient to charge a felony. The Court said:

> A misdemeanor not arising out of the same circumstances as a felony which is also charged in cognizable only in county court. Art. V, §§5(b) and 6(b), Fla. Const.; §§ 26.012(2) and 34.01, Florida Statutes (1979). If the information charges only the

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6. Sections 877.08(3), (4), Fla. Stat.

> misdemeanor, the circuit court does not have jurisdiction and thus any judgment or sentence rendered by it is void. [Citations omitted.] The burden of properly invoking the court's jurisdiction is on the state. See, e.g., Pope at 176.
>
> 397 So.2d at 406, 407.

As demonstrated by these decisions, Florida courts have uniformly and consistently adhered to the principle that, when prior convictions elevate a misdemeanor to a felony, those prior convictions must be alleged in order to confer jurisdiction on the circuit court.

This principle has not been eroded, as the state suggests, by State v. King, 426 So.2d 12 (Fla. 1983). The issue there was whether a juvenile's right not to be indicted could be asserted on appeal when it had not been asserted at trial.

The Court said infirm judgments could be either void or voidable. The test to determine if the judgment was void or only voidable was whether the court had jurisdiction over the subject matter and over the party. The Court noted that by failing to object in the trial court King had subjected himself to the jurisdiction of the Court, thereby waiving the defect of jurisdiction over the person. The jurisdictional prong of subject matter jurisdiction is what is at issue here. That element had not been missing in King, because

> the trial court had jurisdiction of the subject matter . . . because it is a circuit court which has jurisdiction of all felonies. §26.012(2)(d), Fla. Stat. (1981). (Emphasis added)
>
> Id., at 14

The jurisdictional flaw in the information against respondent was not present in King, so King is not controlling in this case, where the circuit court did not have subject matter jurisdiction.

The District Court here, as in Phillips, supra, correctly perceived that subject matter jurisdiction was missing and the circuit court's judgment and sentence were void.

The state cites a subsequent decision of the First District, Pickelsimer v. State, 440 So.2d 47 (Fla. 1st DCA 1983), as somehow being inconsistent with the opinion in Phillips because the court refused to "speculate" on the outcome had motions to dismiss not been filed. Pickelsimer was a reversal under circumstances similar to those here, in which the sufficiency of the information was attacked by pre-trial motions whereas in Phillips the error was first noted on appeal. For that reason the court said it "need not reach the issue presented in Phillips . . . ." 440 So.2d at 48. The decisions are not necessarily inconsistent. But even if another panel of the First District, in an opinion written by the judge who dissented in Phillips, appears reluctant to adhere to Phillips, that is of no consequence now. This Court's answer to the certified questions from Phillips, Donald, and this case will settle the issue.

The questions certified by the District Court were correctly answered in Phillips and Donald. Failure to allege the elements which elevate a misdemeanor to a felony is a fundamental error which deprives the circuit court of jurisdiction over the subject matter. In any event, the respondent made a proper motion raising

this defect in the circuit court, the denial of which was error and the District Court correctly reversed. Pickelsimer, supra.

IV CONCLUSION

The decision of the District Court should be affirmed, because it correctly considered and sustained the respondent's claim of lack of jurisdiction in the circuit court.

Respectfully submitted,

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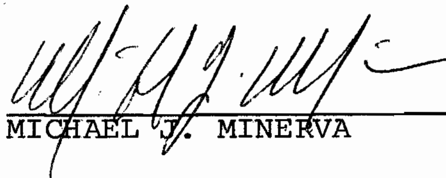
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. mail to Barbara Ann Butler, Assistant Attorney General, Suite 513, Duval County Courthouse, Jacksonville, Florida 32202, and to Mr. McKinley O'Neal, #045190, Avon Park Correctional Institution, Post Office Box 1100, Avon Park, Florida 33825, on this 24th day of April, 1984.



MICHAEL J. MINERVA