IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO.: 64,977
MCKINLEY O'NEAL,)
Respondent.)

PETITIONER'S REPLY BRIEF

JIM SMITH
ATTORNEY GENERAL
Tallahassee, Florida

Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

Attorney for Petitioner

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

References to the Respondent's answer brief on the merit will be by symbol "RB".

POINT ON APPEAL

THE INFORMATION PROPERLY CHARGED THE OFFENSE OF FELONY PETIT THEFT AND THE CIRCUIT COURT PROPERLY ACQUIRED JURISDICTION OVER THE CAUSE.

ARGUMENT

Several assertions in Respondent's answer brief merit reply.

Respondent's initial allegation that the answer to the question presented herein "is virtually self-evident from the statute which created felony petit theft as an offense" is overly simplistic. RB at 3 Such an analysis does not explain the contradictory holdings issuing from the circuit court judges assigned to the criminal docket within the Fourth Judicial Circuit. Likewise unexplained under Respondent's view is the lengthy pendency of cases and somewhat contradictory opinions emanating from the Court of Appeal of Florida, First District. Equally unexplained are the two cases addressing similar certified questions currently pending before this Court. State v. Phillips. No. 64,547 and State v. Donald, No. 64,652. The legal issue before this Court has reached this juncture in the criminal justice system because of competing legal theories which have been brought together under the factual circumstances presented in each case and by the absence of (Phillips, Donald and O'Neal) straightforward authority fully addressing the problem(s) arising after State v. Harris, 356 So.2d 315 (Fla. 1978).

Respondent contends it is the State's "unwarranted supposition" that State v. Harris "'specifically disavows the procedure. . .

whereby specific information concerning prior convictions is contained within the charging document.'" (RB 6) In reaching this conclusion Respondent examines the authority cited in State v. Harris for charging and convicting second offenders. See, State ex rel Lockmiller v. Mayo, 88 Fla. 96, 101 So. 228 (1924); Barnhill v. State, 41 So.2d 329 (Fla. 1949); Nichols v. State, 231 So.2d 526 (Fla. 2d DCA 1970); Shargaa v. State, 102 So.2d 809 (Fla. 1958). These earlier decisions required the State to submit sufficient proof to the jury of the currently charged offense as well as the historical fact of the prior convictions. Id.; cf. State v. Shargaa. However it cannot be conclusively shown that the "only 'conflict' disapproved in Harris was Nichols' provision that the jury be the trier of fact as to the prior convictions". (RB 4)

Respondent submits that Nichols v. State "was not overruled in toto"[1] as this Court "did not, expressly or by implication, hold [in Harris] that the charging document omit the prior offenses relied upon as essential elements of the charge." (RB 5, 4) Admittedly, State v. Harris does not contain such a specific and express holding.

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[1] In Nichols v. State, the defendant was charged with six counts of violating the State beverage laws by unlawful sale of intoxicating beverages without a State liquor license. All counts were identical except for allegations of different dates of sale and different brands of beverages. Each count alleged as the prior conviction the August 30, 1965 beverage law violation. On appeal, Nichols complained of error in permitting "'a prior conviction and a current offense to be presented to a jury at one and the same time, whether by reading an information, or by evidence, even under a second offender statute', and that to do so constituted a violation of due process, the right to a fair and impartial trial and an attack upon the defendant's character and reputation.'" Id. at 527 quoting Nichols' appellate brief. Nichols raised three other issues on appeal. In Harris, this Court "overruled the holding in Nichols v. State, supra, to the extent that it conflicts with Shargaa." Harris at 317.

However the implication prevails. This Court stated:

> Section 812.021(3) and Section 775.084 are essentially identical, with similar purposes, and should afford to a defendant the same procedural safeguards. Under Section 775.084, the State must proceed against a defendant in a separate proceeding by a separate writing, following conviction or adjudication of guilt. No evidence is presented concerning a defendant's prior conviction and thus, there can be no possibility of prejudice. Under Section 812.021(3), the State must specifically allege and prove the fact of prior conviction. The jury is directly confronted with evidence of the defendant's prior criminal activity and the presumption of innocence is destroyed.
>
> . . .
>
> We are thus faced with conflicting holdings between Shargaa and Nichols.

Id. at 316-317. This Court concluded that the Legislature was authorized to create the substantive offense of a felony petit theft, but the Courts were empowered[2] to dictate the implementation procedure. Id. Justice Hatchett, writing for this Court, set forth the approved procedure.

> Section 812.021(3) creates a substantive offense to be tried in the circuit court when felony petit theft is charged, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge.

Id. (emphasis added).

Rule 3.400, F.R.Crim.P., does not mandate that the charging document be tendered to the jury during deliberation. Donaldson v. State, 356 So.2d 351 (Fla. 1st DCA 1978). Yet the previously

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2 Article V, Section 2, Florida Constitution.

quoted portion of Harris can easily be interpreted as requiring that specific data pertaining to the prior convictions not be included in the charging document itself. This interpretation is proper when viewed in conjunction with the remainder of the Harris opinion.

> Upon conviction of the third petit larceny, the Court shall, in a separate proceeding, determine the historical fact of prior convictions and questions regarding identity in accord with general principles of law, and by following the procedures now employed under Section 775.084.

Id. at 317. (emphasis added) As previously stated, the procedures delineated under Section 775.084, require:

> . . . the State must proceed against a defendant in a separate proceeding, by a separate writing, following conviction or adjudication of guilt. No evidence is presented [in the substantive offense] concerning a defendant's prior conviction and thus, there can be no possibility of prejudice.

State v. Harris at 316.

Accordingly the State's position is a permissible interpretation. It is apparent that the procedure advocated by the State is a good faith attempt to preserve the presumption of innocence pursuant to the dicates of State v. Harris and to properly charge the substantive offense of Felony Petit Theft. Inasmuch as both the prosecution and defense have plausible interpretations of the procedure approved in Harris, it is incumbent upon this Court to clarify its earlier directive.

Third, Respondent argues that State v. Black, 385 So.2d 1372 (Fla. 1980), sufficiently undermines that State's argument that

jurisdiction was acquired by citing the Felony Petit Theft statute within the text of the information and using that caption. The factual circumstances of State v. Black are not analogous to those of this case. In Black, the indictment for first degree murder failed to specify the place where the crime took place. The defect was both a deprivation of notice enabling the accused to prepare a proper defense and a failure to fix the jurisdiction of the grand jury and the court. The unique considerations of the indictment procedure were discussed at length[3] and do not relate to the instant procedure of charging a criminal offense by information. Dean v. State, 414 So.2d 1096, 1099 (Fla. 2d DCA 1982). Also absent from State v. Black is the interrelation between the statutory reference in the text of the information and the caption.

The Felony Petit Theft statute is a legislative creation enacted for a specific purpose. This Court has dictated the procedures for its implementation. Just as first degree murder has unique procedures to safeguard certain express constitutional concerns, so to has the felony petit theft statute. The method used to charge the offense in the Respondent's case may not be the proper method to charge another criminal offense, but it is sufficient to vest jurisdiction in the circuit court and to allege the offense of felony petit theft.

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[3] See, State v. Black (J. England, specially concurring) at 1375-1377.

Fourth, Respondent's argument concerning incorporation by reference must fail for the same reason. Although Section 812.014(2)(c), Fla. Stat., refers to initial as well as repetitive violations of the same statutory provision, the combination of the caption, and the statutory reference is sufficient to vest jurisdiction in the circuit court. The information contained a specific description of the single petit theft which the statute classifies as a misdemeanor except "upon a third or subsequent conviction. . . the offender shall be guilty of a felony. . . ." Section 812.014(2)(c). The use of the term "Felony Petit Theft" and filing the information in circuit court evidences a felony charge rather than a second degree misdemeanor as urged by Respondent. (RB 7-9) The information is sufficient to incorporate by reference the language of the cited section defining felony petit theft. Harris at 316; Phillips v. State, 438 So.2d 888, (Fla. 1st DCA 1983). (J. Wentworth, dissenting).

The defect within an information should be termed "fatal" only where there is a total omission of an essential element of a crime or where the information is so vague, indistinct and indefinite as to mislead the accused and embarrass the preparation of the defense or permit a new prosecution for the same offense. State v. Fields, 390 So.2d 128, 130 (Fla. 4th DCA 1980). Gray v. State, 404 So.2d 388, 391 (Fla. 5th DCA 1981). The failure to allege one ingredient of an offense does not render the information invalid as wholly failing to state a crime. Tracey v. State, 130 So.2d 605 (Fla. 1961); State v. Taylor, 283 So.2d 882, 885 (Fla. 4th DCA 1973); Asmer v. State, 416 So.2d 485, 487 (Fla. 4th DCA 1982). This is

particularly true where the information charges the specific section of the statute under which the prosecution proceeds. Asmer v. State.

The State emphasizes that the prosecution also supplied Respondent with a Notice of Intent providing specific data on the prior convictions relied upon by the State. It is this procedure which this Court sanctioned in urging that the procedures now employed under Section 775.084 be followed. State v. Harris at 317.

Felony Petit Theft is a substantive offense, not a sentence enhancement provision. However given its special nature and the desire to afford the accused the presumption of innocence, the procedures used to charge the offense are similar to those enhancement provisions set forth in Section 775.084. Harris at 317. While enhancement of a charge is technically different from enhancement of punishment, the similarity is sufficient to justify analogizing one to the other.

There is a difference between an information which totally fails to vest jurisdiction and one which is imprecise and perhaps imperfect due to the special considerations evident in charging a particular offense. The State submits the instant information is not fundamentally defective.

Lastly, the State submits that in Hinson v. State, 436 So.2d 437 (Fla. 4th DCA 1983), the circuit court was permitted to retain

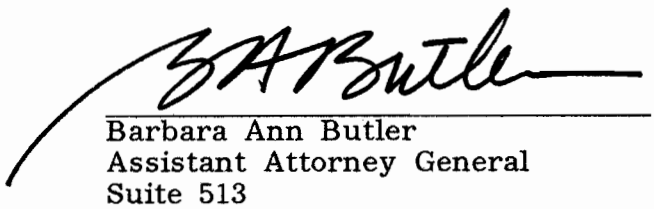
jurisdiction over an offense charged as a felony violation of section 509.151, Fla. Stat. (1981), but which in actuality charged only a misdemeanor offense. The information failed to allege that the food, lodging and other accomodations were valued at one hundred dollars or more. The Third District reversed and remanded with instructions to impose a misdemeanor sentence. See also, Lumia v. State, 372 So.2d 525 (Fla. 4th DCA 1979).

CONCLUSION

Based on the foregoing argument, supported by the circumstances and authorities cited herein, Petitioner respectfully maintains that the circuit court is not deprived of subject-matter jurisdiction when the caption of the charging document charges felony petit theft and the body of the information cites the proper Florida Statute, Section 812.014(2)(c), but the text of the charge alleges the value of the property stolen to be less than $100. The certified question should be answered in the negative. Petitioner requests that this Court reverse the decision of the Court of Appeal thereby affirming the judgment and sentence of the trial court.

Respectfully submitted,

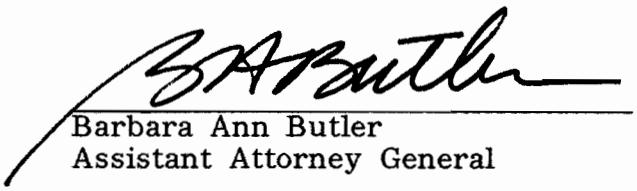
JIM SMITH
ATTORNEY GENERAL



Barbara Ann Butler
Assistant Attorney General
Suite 513
Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-3117

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Michael J. Minerva, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32301, this 16 day of May, 1984.



Barbara Ann Butler
Assistant Attorney General

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