O/C 4-10-85

IN THE SUPREME COURT OF FLORIDA

GRANDERSON DAVIS, JR.,

Petitioner,

vs. CASE NO. 65,121

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the appellant in the First District Court of Appeal and the defendant in the Circuit Court of Leon County. Respondent was the Appellee in the First District Court of Appeal and the prosecuting authority in the circuit court. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

The State of Florida accepts Petitioner's statement of the case and facts insofar as it is sufficient for the Court to determine the purely legal question for which review apparently was granted. However, the Court should be aware that the record contains sufficient evidence from which the jury could infer that Petitioner endeavored to obtain a Mercedes automobile worth $23,129.25 from Kinnebrew Motors in Tallahassee by means of a worthless check. As the First District noted, Davis v. State, 445 So.2d 627, 629 (Fla. 1st DCA 1984), Petitioner was apprehended before he could obtain the automobile.

SUMMARY OF ARGUMENT

This Court has held on numerous occasions that the State has the absolute discretion concerning which charge to prosecute if criminal conduct falls within overlapping criminal statutes or subsections of the same statute. Therefore, since the plain meaning of the words of the statute allows prosecution under each section of the theft statute, the trial court correctly denied the motion to dismiss. In the alternative, should the Court find that the plain words of the statute are ambiguous, the lower court should be affirmed anyway because resort to extrinsic evidence reveals that the Legislature fully intended that the first degree grand theft subsection apply to all property worth more than $20,000, regardless of whether such property was specifically listed in the second degree grand theft subsection. The First District correctly concluded that the Legislature intended that the State not have to prove value when motor vehicles are stolen. However, the First District was also correct that the Legislature allowed the State the discretion to charge a more serious felony by accepting the burden to prove the element of property worth more than $20,000.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO DISMISS BECAUSE THE LEGISLATURE HAS PROVIDED THAT THEFT OF PROPERTY WORTH MORE THAN $20,000 IS FIRST DEGREE GRAND THEFT, PUNISHABLE AS A SECOND DEGREE FELONY.

It was not disputed in the lower courts that the value of the Mercedes automobile which Petitioner endeavored to obtain exceeded $20,000. Therefore, the only issue before this Court is whether the theft statutue allows a prosecutor discretion to charge theft of a motor vehicle worth more than $20,000 as first degree grand theft (a second degree felony) in light of the fact that the theft statute also provides that theft of "a motor vehicle" constitutes second degree grand theft (a third degree felony). Both the trial court and the First District Court of Appeal found that the Legislature intended that prosecutors have such discretion, and the State submits that both courts were correct and that the First District's opinion should be affirmed.

Although Petitioner's entire argument is based upon statutory construction, counsel has seen fit to cite only the rule of construction known as "the rule of lenity." However, counsel has neglected to cite the well known companion rule which provides that the rule of lenity may not be used to defeat legislative intent. As stated by the United States Supreme Court in Albernaz v. United States, 450 U.S. 333, 342, 101 S.Ct. 1137, 67 L.Ed.2d 275, 284 (1981),

"[l]enity thus serves only as an aid for resolving an ambiguity; it is not to be used to beget one. The rule comes into operation 'at the end of the process of construing what congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" (Emphasis added)

Thus, it is the State's position that the theft statute is not ambiguous and that the Court does not have to look past the plain meaning of the words of the statute. This Court has repeatedly recognized that under Florida law, a prosecutor is permitted absolute discretion in determining what charges to file regardless of whether two criminal statutes overlap. See Soverino v. State, 356 So.2d 269, 272 (Fla. 1978), in which this Court recognized that a prosecutor had the absolute discretion to charge a defendant with the felony of battery upon a law enforcement officer under §784.07, Fla. Stat., even though the defendant's conduct also violated the battery statute, §784.03, Fla. Stat.

The Court quoted from Fayerweather v. State, 332 So.2d 21, 22 (Fla. 1976), for the proposition that:

> It is not unusual for a course of criminal conduct to violate laws that overlap yet vary in their penalties. Multiple sentences are even allowed for conduct arising from the same incident. [Citations omitted] Traditionally, the Legislature has left to the prosecutor's discretion which violations to prosecute and hence which range of penalties to visit upon the offender. (Emphasis added)

Soverino and Fayerweather are not inconsistent with other decisions from this Court. For example, in Huckaby v. State, 343 So.2d 29, 32 (Fla. 1977), the Court recognized that "the crimes of rape and incest are not mutually exclusive, and that prosecutorial discretion exists when conduct would be criminal under both incest and other statutes. McCaskill v. State, 45 So. 843 (1908)." In Cilento v. State, 377 So.2d 663, 666 (Fla. 1979), the Court reiterated "[t]he fact that certain conduct might violate more than one criminal provision does not necessarily render it invalid." The Court recognized that the defendant in that case, who was a physician, "is capable of violating either or both of the provisions, 893.13(1) and 893.13(2)."

In Cleveland v. State, 417 So.2d 653, 654 (Fla. 1982), the Court stated that a state attorney has "complete discretion in making the decision to charge and prosecute." Also relevant is State v. Young, 371 So.2d 1029 (Fla. 1979), in which the Court held that a defendant could be charged under either the general manslaughter statute or the vehicular homicide statute even though the latter statute carried a less severe penalty.

Therefore, it is beyond dispute that this Court has repeatedly recognized that the state attorney has absolute discretion concerning which charge to prosecute if criminal charges overlap. Should Petitioner argue that his case is different because it involves different subsections of the same statute, the State would point out that in

State v. Getz, 435 So.2d 789, 791 (Fla. 1983) (relied upon by Petitioner), the identical argument was rejected. The Court stated, "[w]e see no real distinction between Borges [Borges v. State, 415 So.2d 1265 (Fla. 1982)] and this case. The fact that the offenses for which respondent was convicted and sentenced are defined in the same statute is irrelevant because it is the intent of the Legislature which controls in this situation." (Emphasis added)

In addition to the fact that the language quoted from Getz, supra, supports the State's argument, Petitioner's reliance upon that case is misplaced for a second reason. Petitioner has taken out of context the Court's statement in Getz that value was not an element of proof in the offense of theft of a firearm defined by §812.014(1)(b)(3), Fla. Stat. The State does not disagree with the Court's statement of the law, and, in fact, that was the State's position when the undersigned argued Getz in this Court. However, just because the Legislature has chosen not to make value a required element of proof for the third degree felony of theft of a firearm, it does not necessarily follow that the Legislature has not given the State the discretion to make proof of value an element of the more serious first degree grand theft of property worth more than $20,000. In other words, Petitioner is arguing apples and oranges.

Petitioner's attempt to bootstrap his case upon the holding of State v. Grappin, 450 So.2d 480 (Fla. 1984), is

misplaced. All that case involved was whether the theft statute allowed a separate prosecution for each firearm which was stolen. The Court recognized that since the Legislature had used a unit of prosecution, i.e., a motor vehicle, separate offenses were committed when multiple firearms were stolen during one criminal episode. The Court did not have before it and did not address the question of whether thefts of multiple firearms during one criminal episode had to be charged as second degree grand thefts as opposed to first degree grand thefts (assuming the requisite $20,000 value threshold was met).

In light of the above discussion, the State submits that it is beyond dispute that a state attorney has the discretion to choose which charge to prosecute if criminal conduct falls within two or more statutes or subsections of the same statute which overlap. Accordingly, there is no need for the Court to employ statutory construction to determine legislative intent.

However, should the Court disagree, the following discussion is offered. This Court has previously recognized on numerous occasions that statutes should be construed to avoid absurd results. See, e.g., Dorsey v. State, 402 So.2d 1178, 1183 (Fla. 1981). This means that statutes should not be construed in a manner which would render a statute purposeless. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Moreover, courts should not speculate on constructions which might appear more reasonable if the language expressed

by the Legislature is clear. Heredia v. Allstate Insurance Co., 358 So.2d 1353, 1355 (Fla. 1978). Furthermore, provisions of an act are to be read as consistent with one another rather than in conflict if there is any reasonable basis for consistency. State v. Putnam County Development Authority, 249 So.2d 6, 10 (Fla. 1971).

The Court has also recognized that legislative intent is to be determined primarily from the plain language of the statute. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976). The Court has also recognized that ambiguity in the meaning of a statute must yield in light of legislative purpose. State v. City of St. Petersburg, 302 So.2d 756, 757 (Fla. 1974). Furthermore, when the Legislature amends a statute, it is presumed that the Legislature intended a new meaning. Reino v. State, 352 So.2d 853, 861 (Fla. 1977). Finally, although it is permissible to resort to extrinsic evidence to determine legislative intent, the Court has recognized that this should be done only in order to resolve ambiguity. Ison v. Zimmerman, 372 So.2d 431, 434 (Fla. 1979). With these standards in mind, the State submits (as an alternative argument) that the legislative history of the theft statute reveals that the Legislature intended that the State could charge thefts of motor vehicles worth more than $20,000 as first degree grand thefts. As this Court recently recognized in Goddard v. State, 458 So.2d 230, 233 (Fla. 1984), the theft statute was enacted in 1977 as part of the Florida Antifencing Act, which was patterned after a model act.

The State has appended to this brief certain materials taken from the State archives concerning the legislative history of the theft statute. It is apparent from the May 17, 1977, Senate Staff Analysis of Senate Bill 1431 that the Legislature was concerned with penalizing to a greater extent those defendants who stole property worth more than $20,000. No mention is made of excluding motor vehicles or other of the specifically listed property in the theft statute regardless of that property's value. Also relevant is the Impact Statement on Senate Bill 196, which was the predecessor of the bill which ultimately passed--the Impact Statement reveals that the crime of grand larceny was to be divided into first and second degree, "depending upon whether the property stolen is worth $20,000 or more." The Senate Staff Analysis for Senate Bill 196 also reveals that the intent behind the bill was to provide a more severe penalty if the property stolen was worth more than $20,000. Similarly, the summary of House Bill 783 is consistent--"if the value of the property is $20,000 or more the crime would be grand larceny in the first degree, a felony of the second degree." Again, no mention is made of requiring that expensive automobiles be charged as the less serious second degree grand theft.

Should there be any doubt about the Legislature's intent after the Court examines the appended material, the State respectfully suggests that this doubt can be resolved by listening to the tapes of the various committee meetings.

For example, the tape of the May 3, 1977, Judiciary Criminal Committee hearing reveals that the sponsor specifically stated that it was his intent to go after criminals who steal high value items. (Tape of May 3, 1977, Judiciary-Criminal Committee meeting, at marker #216, series 625/R.G.920, cassette box 94). The tape of the May 10, 1977, meeting is consistent. It reveals that the act was patterned after the model theft act and that the intent was to eliminate the common law defenses while allowing greater penalties for theft of high value items. (Tape of May 10, 1977, Judiciary-Criminal Committee meeting, at marker #686, series 625/R.G.920, cassette box 94).

During discussion on the bill, the sponsor specifically commented that his constituents were complaining that someone who stole a high value item worth say $100,000 received the same penalty as a thief who stole something worth $100.01. Obviously, that is why the new theft statute allows for various gradations of theft depending upon value. However, if Petitioner's argument is accepted, it would mean that a defendant who stole a boat worth $20,001 could be convicted of first degree grand theft whereas another defendant who stole a Rolls Royce worth more than $100,000 could be convicted only of second degree grand theft. The State submits that this would be just the type of absurd result condemned by the case law previously cited.

CONCLUSION

Based on the facts and foregoing argument, Petitioner's judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 13th day of February, 1985.

Lawrence A. Kaden

LAWRENCE A. KADEN

OF COUNSEL