D/a 4-10-85

IN THE FLORIDA SUPREME COURT

GRANDERSON DAVIS, JR.,

Petitioner,

v. CASE NO. 65,121

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, the appellant in the First District, and will be referred to as petitioner in this brief. The state will be referred to as respondent. A one volume record on appeal, including transcripts, will be referred to as "R" followed by the appropriate page number in parentheses. Attached hereto is an appendix, containing the opinion of the lower tribunal, Davis v. State, 445 So.2d 627 (Fla. 1st DCA 1984).

II STATEMENT OF THE CASE AND FACTS

By amended information filed November 9, 1982, petitioner was charged in Count I thereof with grand theft:

> . . .did knowingly endeavor to obtain or use a 1982 Mercedes-Benz motor vehicle of the value of $20,000.00 or more, the property of Kinnebrew Motors, Inc., with the intent to either temporarily or permanently deprive Kinnebrew Motors, Inc. of a right to the property or a benefit therefrom or to appropriate the property to his own use or the use of any person not entitled thereto, contrary to Section 812.014, Florida Statutes.

(R 1). The cause proceeded to jury on November 17, 1982, before Circuit Judge J. Lewis Hall. Just prior to jury selection, petitioner's counsel moved to dismiss the information, arguing that petitioner could only be charged with theft with a motor vehicle, a third degree felony, rather than theft of property of a value of $20,000 or more, a second degree felony (R 65-66). The prosecutor argued that the theft of a motor vehicle, if it had a value of $20,000 or more, could be prosecuted as the more serious crime (R 67). The trial court denied the motion, finding:

> THE COURT: All right, let me tell you what I am going to do. I am going to deny your motion. I am going to place, for the record purposes, that this is a very sloppily-worded statute.
>
> It is my view that the overall context of this statute, that it was the legislative intent to make sure that certain enumerated items would be at least a third degree felony, but it would not be limiting if one of those enumerated items should have a value exceeding $20,000.00, it would nonetheless be amenable to charge a second degree felony. That is about as clear as I can put that on the record for an appeal basis.

(R 71). Upon his conviction, petitioner was adjudicated guilty of grand theft as a second degree felony and sentenced to five years in state prison (R 34-36).

Petitioner presented the same argument on appeal. The First District rejected it, and held:

> We do not believe that the legislature intended such a construction of the provisions of the theft statute. A more reasonable construction, and one we adopt, is that the enumeration of certain kinds of property in Section (2)(b) of the theft statute is a recognition that stealing certain kinds of property should be treated at least as third degree felonies regardless of the value of such property but that first degree grand theft may be charged where that property has a value of $20,000 or more. The fact that such a construction imbues the prosecuting authority with the discretion to decide whether to charge theft of a $20,000 motor vehicle as a third degree felony under subsection 2(b) or as a first degree felony under subsection 2(a) is unavailing to the defendant.

445 So.2d at 628-29 (emphasis in original).

After rehearing was denied by the lower tribunal, a notice of discretionary review was timely filed on April 3, 1984.

III SUMMARY OF ARGUMENT

Petitioner will argue in this brief that the Legislature intended that theft of a motor vehicle is a third degree felony, rather than a second degree felony, without regard to value of the motor vehicle. Thus, petitioner's judgment and sentence for the second degree felony were improper.

IV ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS BECAUSE THE LEGISLATURE, BY ITS USE OF THE TERM "A MOTOR VEHICLE" INTENDED THAT THE THEFT OF A MOTOR VEHICLE BE PUNISHED AS A THIRD DEGREE FELONY.

Section 812.014, Florida Statutes provides:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent:
> (a) To deprive the other person of a right to the property or a benefit therefrom.
> (b) To appropriate the property to his own use or to the use of any person not entitled thereto.
> (2)(a) If the property stolen is of the value of $20,000 or more, the offender shall be guilty of grand theft in the first degree, punishable as a felony of the second degree, as provided by ss. 775.082, 775.083, and 775.084.
> (b) It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084, if the property stolen is:
> 1. Valued at $100 or more, but less than $20,000.
> 2. A will, codicil, or other testamentary instrument.
> 3. A firearm.
> 4. A motor vehicle.
> 5. Any member of the genus Bos (cattle) or the genus Equus (horse), or any hybrid of the specified genera.
> 6. Any fire extinguisher.
> 7. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit.
> 8. Taken from a designated construction site identified by the posting of a sign as provided for in s. 810.09(2)(d).

Petitioner will argue on authority of Grappin v. State, 450 So.2d 480 (Fla. 1984), State v. Getz, 435 So.2d 789 (Fla. 1983) and State v. Watts, No. 64,629 (Fla. January 15, 1985) that the Legislature's use of the term "a motor vehicle" instead

of "any motor vehicle" shows the Legislature's intent that the theft of a motor vehicle, even if worth more than $20,000, is a third degree felony, because a motor vehicle is a "unit of prosecution".

In Grappin v. State, supra, this Court had before it a decision of the Second District in State v. Grappin, 427 So.2d 760 (Fla. 2d DCA 1983), in which the Second District, relying upon the Legislature's use of the word "a" preceding firearm, motor vehicle, or will, held that the Legislature intended for these items to be a "unit of prosecution":

> Our legislature, in enacting Section 812.014 in 1977, prefaced the respective item of property in parts two through four of subsection (2)(b) with the article "a" ("2. A will, codicil, or testamentary instrument." "3. A firearm." "4. A motor vehicle" [emphasis added]". In contrast, it prefaced the respective object of property in parts five through seven with the article "any" ("5. Any member of the genus Bos [cattle] or the genus Equus [horse], or any hybrid of the specified genera." "6. Any fire extinguisher." "7. Any amount of citrus fruit consisting of 2,000 or more individual pieces of fruit." [emphasis added]).
>
> * * *
>
> We do not believe that the legislature inadvertently inserted different articles in parts two through four and five through seven. In our view, the legislature's use of the article "a" in parts two through four reveals its recognition of the distinction in meaning between the articles "any" and "a" for purposes of establishing the permissible unit of prosecution. In other words, its use of different articles signifies its intent, with respect to simultaneously pilfered firearms (or testamentary instruments or motor vehicles), to treat separately each stick in the bundle.

427 So.2d at 762-63 (footnotes omitted).

This Court agreed with the Second District's analysis of the statute and approved its decision:

> We find that the use of the article "a" in reference to "a firearm" in Section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution.

450 So.2d at 482.

This Court in Grappin also relied upon its earlier decision in State v. Getz, supra, in which it had held that contemporaneous theft of a firearm and theft of items constituting petit theft constituted separate offenses. Specifically, this Court held in State v. Getz:

> It is our view that as the theft statute is written, the legislature intended to make theft of a firearm under subsection (2)(b)3 and theft of property worth less than one hundred dollars under subsection (2)(c) separate and distinct offenses, even where the thefts occur in a single criminal episode. It is clear from a reading of Section 812.014 that the legislature intended to treat the theft of different types of property as separate criminal offenses and to establish distinct punishments for the separate offenses. We note that if a firearm is stolen, its value is not an element of the offense and it is grand theft even if the firearm is worth less than one hundred dollars.

435 So.2d at 791 (emphasis added).

Consistent with the "a/any" analysis of Grappin, this Court recently held in State v. Watts, supra, that a prisoner who was in possession of two homemade knives committed only one offense, because the Legislature, in prohibiting such conduct, outlawed "possession of any firearm or weapon of any kind or any explosive substance." Section 944.47 (1)(a)5, Florida Statutes (emphasis added).

Examination of the old larceny statute, which was replaced by the present theft statute in 1977, shows further the Legislature's intent. Section 812.021(2), Florida Statutes (repealed) provided:

> (2) If the property stolen is:
> (a) Of the value of $100 or more;
> (b) Of the aggregate value of $200 or more, taken in any 12-consecutive month period, by an agent, servant, or employee from his principal or employer by a series or combination of any of the acts denounced in this section, as part of a common scheme or design to defraud;
> (c) A will, codicil or other testamentary instrument;
> (d) A firearm;
> (e) A motor vehicle;
> (f) Any member of the genus Bos (cattle) or the genus Equus (horse), or any hybrid of the specified genera; or
> (g) Any make, type, or model of fire extinguisher, the offender shall be deemed guilty of grand larceny, which constitutes a felony of the third degree.

Thus, the Legislature used the same language ("a will, a firearm, a motor vehicle") in defining grand theft that it had used in defining grand larceny. The Legislature, when it added Section 812.014(2)(a) to cover property stolen of a value of $20,000 or more, could have added qualifying language to cover the theft of an expensive motor vehicle or firearm, e.g., "notwithstanding subsections (b)3 or (b)4", or "theft of a firearm or motor vehicle is a third degree felony, unless the firearm or motor vehicle has a value of $20,000 or more". The Legislature did neither of these, so its intent that a motor vehicle theft be treated as a third degree felony is clear.

State v. Getz, supra, held that a firearm is a firearm regardless of value. This Court has likewise held, under the old larceny statute, that a motor vehicle is a motor vehicle regardless of value. In Johnson v. State, 380 So.2d 1024 (Fla. 1979) the defendant was on trial for auto larceny and requested an instruction on petit larceny as a lesser offense. This Court held that petit larceny was not a proper lesser offense: "Theft of a motor vehicle is grand larceny regardless of value". Id. at 1026. Thus, a motor vehicle is a motor vehicle is a motor vehicle, just like a firearm is a firearm is a firearm.

Petitioner's interpretation of the statute is supported by the often cited rule "that criminal statutes are to be construed strictly in favor of the person against whom a penalty is to be imposed". Ferguson v. State, 377 So.2d 709, 711 (Fla. 1979). See also Reino v. State, 352 So.2d 853 (Fla. 1977) and State v. Winters, 346 So.2d 991 (Fla. 1977). As this Court further stated in Ferguson:

> Nothing not clearly and intelligently described in a statute's very words, as well as manifestly intended by the legislature, shall be considered included within its terms.

See also Section 775.012(1), Florida Statutes.

In summary, then, petitioner has demonstrated that the Legislature's choice of the term "a motor vehicle" demonstrates that it intended an auto theft to be a unit of prosecution without regard to value. This view is consistent with the prior larceny statute, cases on the theft of a firearm, and other rules of statutory construction. The First District was in error when it held that petitioner

was properly convicted of a second degree felony. This Court must vacate petitioner's judgment and sentence.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court vacate the judgment and sentence and remand for entry of a proper judgment for a third degree felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner of the Merits has been furnished by hand delivery to Mr. Lawrence A. Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to petitioner, Granderson Davis, Jr., 3960 Old Sunbeam Road, #1404, Jacksonville, Florida 32217 on this 24 day of January, 1985.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER