IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,183

L.S., a juvenile,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, L.S., was the Appellant in the Third District Court of Appeal and the Respondent in the Circuit Court of Dade County, Florida. Respondent, the State of Florida, was the Appellee and the Petitioner in those same courts. The parties will be referred to as Petitioner and Respondent in this brief.

The symbol "A" designates the Appendix and shall be accompanied by an appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts Petitioner's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below with such exceptions as are noted in the argument portion of this brief.

ISSUE PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF WATERS V. STATE, 436 So.2d 66 (Fla. 1983), AND BENNETT V. STATE, 438 So.2d 1034 (Fla. 2d DCA 1983)?

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE PRESENT CASE IS NOT IN DIRECT AND EXPRESS CONFLICT WITH STATE V. WATERS, 436 So.2d 68 (Fla. 1983) AND BENNETT V. STATE, 438 So.2d 1034 (Fla. 1983).

Although the State acknowledges that the decision of the Second District Court of Appeal in Bennett v. State, 438 So.2d 1034 (Fla. 2nd DCA 1983), conflicts with the present case, the decision of the Third District Court of Appeal in the instant case is consistent with this Court's announcement in State v. Waters, 436 So.2d 66 (Fla. 1983). As a result, this Court should, if jurisdiction accepted, summarily affirm the present decision.

In State v. Waters, supra, this Court resolved the question of whether Section 810.07 Fla.Stat., must be alleged in informations for the State to take advantage of its presumption of prima facie intent:

> We therefore hold that an indictment or information charging burglary is not required to specify the offense which the accused is alleged to have intended to commit. If all the essential statutory elements of the offense are alleged, the accusatory document will generally be deemed sufficient.
>
> State v. Waters, supra. 436 So.2d at 69.

This Court also addressed the issue of whether proof of the factual elements of Section 810.07, Fla.Stat., were sufficient to establish a prima facie case of intent to commit an offense:

> Looking at the plain language of the statute, we can see it sets out three factual elements: entry, stealth, and lack of consent. If proved, the statute provides, the facts thus shown "shall be prima facie evidence of entering with intent to commit an offense". That is, proof of the three elements will be always deemed to be a sufficient showing to allow a case of burglary to go the jury if there was no other evidence of the Defendant's state of mind at the time of the unlawful entering, and will be legally sufficient proof of intent to support a verdict. Thus Section 810.07 provides the State with an alternative method of proving a charge of burglary when it is unable to adduce any evidence of the Defendant's criminal intent when unlawfully entering a structure or conveyance. . .
>
> * * *
>
> . . . Section 810.07 only comes into operation as an alternative means of proving the element of intent. State v. Waters, supra, 436 So.2d at 20.

In Bennett v. State, supra., Second District Court of Appeal ruled that if the State charges that a Defendant did intend to commit a specific offense after the breaking and entering occurrs, then the State must prove that the Defendant did in fact intend to commit the offense. The Bennett Court continued by stating that when the State does so

charge, the proof must be established without the benefit of Section 810.07. Bennett v. State, supra, 438 So.2d at 1035.

In the present case, the Third District Court of Appeal was faced with the same situation as that in Bennett. The State had charged L.S. with burglary. In the charging document, the State alleged the intent requirement as follows:

> This child . . . did unlawfully enter or remain in a certain structure. . . with the intent to commit an offense therein, to-wit: Theft. . . .

The Third District Court of Appeal concluded that because specification of the offense intended is not essential, State v. Waters, supra., the specific offense alleged in the charging document was mere surplusage and need not be proven. Further, the Court ruled that the State may avail itself of Section 810.07, Fla.Stat. where the State charges the Defendant had intent to commit a specific offense after breaking and entering.

The decision in the present case wholly comports with this Court's opinion in Waters. In that case, this Court clearly stated that the State need only allege that a Defendant had an intent to commit offense. There is no

requirement that a specific offense was intended. State v. Waters, supra., 436 So.2d at 69. Working from that fundamental proposition, it is obvious that anything further included beyond the essential allegation is correctly deemed surplusage. As this Court noted, Section 810.07 provides the State with an alternative method of proving burglary where it is unable to adduce any evidence of criminal intent. As such, it was properly available to the State in this case.[1]

A brief review of Bennett and the decision in this present case reveals that the course taken by the Third District Court of Appeal is a well-reasoned logical extension of this Court's opinion in Waters. Bennett, lacking any underlying support from the Waters' decision, was wrongly decided and should not be filed by the Florida District Courts of Appeal. As a result, the State submits that summary affirmance in the present case is warranted.

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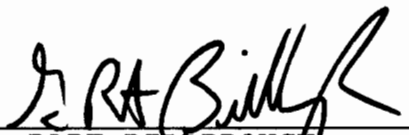
[1] The Bennett decision, however, cites to no portions of the Waters opinion to support the bold assertion that once the State alleges intent to commit a specific offense, it is bound by that allegation. To the contrary, The Waters opinion indicates the exact opposite.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Respondent will respectfully urge that the Petitioner's Petition for this Discretionary Review be denied or, in the alternative, granted and the opinion of Third District Court of Appeal in the present case be summarily affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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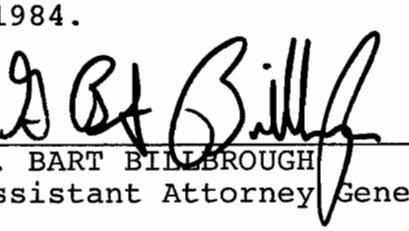
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was served by mail upon Sharon B. Jacobs, For the Law Firm of Chaykin, Karlan and Jacobs, 114 Giralda Avenue, Coral Gables, Florida 33134, on this 7th day of May, 1984.



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