O/A 12-6-84

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 MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

G. BART BILLBROUGH
Assistant Attorney General
Department of Legal Affairs
Ruth Bryan Owen Rohde Building
Florida Regional Service Center
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

Petitioner, L.S., a juvenile, 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 the Petitioner and Respondent in this brief. References to the record-on-appeal will be designated by the "R" and shall be accompanied by an appropriate page number.

STATEMENT OF THE CASE AND FACTS

On June 15, 1983, the Respondent, the State of Florida, filed a petition for delinquency charging the Petitioner, L.S., with theft, and violation of Section 812.014, Fla. Stat., and burglary, in violation of Section 810.02, Fla. Stat. (R. 1). On June 27, 1983, a denial was entered by the Petitioner. (R. 2).

On July 28, 1983, the Honorable Seymour Gelber, Circuit Court Judge, conducted a non-jury trial on the charges. Prior to trial, the parties stipulated that the Petitioner's fingerprints were found on the inner windowsill of the rear bedroom at 3031 N.W. 48th Terrace, Miami, Dade County, Florida, on Friday, April 22, 1983, at approximately 4:30 p.m. The prints were found in a manner consistent with climbing through the win-

dow. The parties also stipulated that there was no way to determine when the prints were actually made. (R. 22-24).

The only witness to testify was Hortense Louise Robinson, the resident of 3031 N.W. 48th Terrace Miami, Dade County, Florida. Robinson testified that on April 22, 1983, someone had entered her rear bedroom window and taken jewelry, a pen set, and a camera, valued at approximately eleven hundred dollars ($1,100). (R. 25-27). The burglary occurred between 8:00 a.m. and 2:00 p.m. (R. 30-31).

Robinson further testified that her home had been burglarized on the previous Friday as well, but all of the missing items were present during the week prior to the second burglary. (R. 32-33). Robinson stated that she cleaned her house every Saturday, and that her efforts included the windowsills in the rear bedroom area. (R. 28).

Finally, Robinson told the Court that she had seen the Petitioner walking around the neighborhood streets, but that he had never been invited in her home nor had permission to enter it or take any items from the residence. (R. 27).

The Petitioner moved for a judgment of acquittal at the conclusion of Ms. Robinson's testimony. The Petitioner argued that the State could not rely on Section 810.07, Fla. Stat., to establish an intent on the burglary count without alleging

so in the charging document. The Petitioner also submitted in his finger print on the inside windowsill of the bedroom was insufficient to establish a burglary theft. (R. 35-37).

The trial court denied the motion and, after the Petitioner rested,[1] adjudicated the Petitioner delinquent. (R. 37). On August 1, 1983, the Petitioner was committed to the Department of Health and Rehabilitated Services and adjudicated delinquent for the offenses of trepass,[2] burglary and theft. (R. 6).

On March 13, 1984, the Third District Court of Appeal of Florida affirmed in part and reversed in part. L.S. v. State, 446 So.2d 1148 (Fla. 3d dCA 1984). Citing the State's concession that the evidence was insufficient to support the theft conviction, the court reversed on that count. On the burglary conviction, however, the court upheld the adjudication. In doing so, the Third District Court of Appeal acknowledged that its decision conflicted with the Second District Court of Appeal decision in Bennett v. State, 438 So.2d 1034 (Fla. 2d dCA 1983).

This Court accepted jurisdiction to resolve the conflict.

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[1] The Petitioner did not testify or present any evidence.

[2] Trial court adjudicated the Petitioner delinquent for a trespass on the case of 83-8629-FJB-05. Because that the adjudication is not challenge on appeal, it should not be disturbed by any outcome of this case. (R. 6).

POINT ON APPEAL

WHETHER THE TRIAL COURT ERRED IN PERMITTING THE STATE TO ESTABLISH THE ELEMENT OF INTENT IN A BURGLARY PROSECUTION BY THE USE OF THE PRESUMPTION OF INTENT STATUTE, SECTION 810.07, FLA.STAT, WHERE THE CHARGING DOCUMENT ALLEGED THAT THE PETITIONER ENTERED WITH "INTENT TO COMMIT AN OFFENSE THEREIN, TO WIT: THEFT"?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN PERMITTING THE STATE TO ESTABLISH THE ELEMENT OF INTENT IN A BURGLARY PROSECUTION BY THE USE OF THE PRESUMPTION OF INTENT STATUTE, SECTION 810.07, FLA. STAT., WHERE THE CHARGING DOCUMENT ALLEGED THAT THE PETITIONER ENTERED WITH "INTENT TO COMMIT AN OFFENSE THEREIN, TO WIT: THEFT".

The crux of the Petitioner's argument is that the State should be entitled to "sandbag" the defense and rely on Section 810.07, Fla. Stat., to establish intent where the charging document specifies an intent to commit a specific offense. A review of the two conflicting decisions, this Court's opinion in State v. Waters, 436 So.2d 66 (Fla. 1983), and the history of the burglary statute demonstrates that the decision of the Third District Court of Appeal in the present case was emanately correct.

The conflict between the L.S. and Bennett opinions grew out of an issue specifically avoided by this Court in State v. Waters, 436 So.2d 66 (Fla. 1983). In Waters, an information was filed which alleged that Waters had attempted to unlawfully enter the dwelling of John Rush with intent to commit the offense of theft therein. The case was tried to the court sitting without a jury. The dwelling's occupant, John Rush, testified that he had caught Waters trying to break into his rented room which was padlocked on the outside. Investigating officers

testified that they observed evidence of an attempted breaking in the form of indentations and a bent padlock hasp on the door. Rush also testified that his closed, stereo phonograph, and television set were inside the padlocked room. After hearing all the testimony, including a claim of innocence from Waters, the trial court found him guilty of attempted burglary.

On appeal, the district court held that the evidence was insufficient to prove the element of intent to commit theft and therefore directed that a judgment be entered adjudicating Waters guilty of attempted trespass only. In doing so, however, the court certified the following questions of great public importance:

> 1. In a prosecution for burglary under Section 810.072, Fla.Stat. (1979), is it necessary for the State to allege an intent to commit a specific offense?
>
> 2. Is the statutory rebuttable presumption contained in Section 810.07, Fla.Stat. (1979), sufficient to prove a prima facie case of intent to commit a specific offense of theft?
>
> Waters v. State, 401 So.2d 1131, 1133 (Fla. 4th DCA 1981).

In addressing the questions, this Court further held that the State need not allege which specific offense the accused intended at the time of his entry:

With regard to the first certified question, our answer his that an indictment or information charging burglary need not specify the offense the accused is alleged to have intended to commit, although it must allege the essential element of intent to commit an offense. The traditional practice, has Respondent correctly points out, has been to require allegation of intent to commit a specified offense and to require proof of such intent. (Citations omitted).

* * *

The early cases establishing the requirement of detailed specificty in indictments and informations were decided long before this Court adopted broad reciprocal discovery procedures. Our present discovery rules provide the defendant with a much better means for avoiding suprise or embarrassment in the preparation of a defense than just the terms utilized in a charging document. Further, trial courtss have the authority to remedy a lack of definiteness by granting a defendant's motion for a statement of particulars. Fla.R.Crim.P. 3.140(n). In this decision, we merely hold that in a burglary charge it not per se required that the particular offense which the accused allegedly intented to commit in the premises be specified. This specificty will have to be furnished by the prosecution before the case goes to trial if timely requested by the defendant. Although the better practice is to provide specificty in the charging document, it is not fundamental error to use the general phraseology of the statute on which the charge is based. There clearly has been no showing of prejudice in this cause.

> The essential elements of burglary as defined in Section 810.02 are (1) entering or remaining in, (2) a structure or conveyance, (3) with intent to commit an offense therein. Since the element of specific criminal intent may generally be alleged in a language of the statute, the indictment or information sufficiently alleges this element if it sets forth that the accused acted "with the intent to commit an offense therein." Section 810.02(1), Fla.Stat. (1981). Of course, such intent, along with the other elements must then be proved beyond a reasonable doubt in order for a verdict of guilt and judgment thereon to be proper. As a practical matter, where the State has evidence of the intent element, such evidence will generally show intent to commit a specific offense. In general, therefore, it will not be difficult for the State to specify the offense in the indictment or information. For this reason we expect that the traditional practice of specifying the offense will continue. We merely hold that specification of the offense intended is not so essential apart of the intent element as to require that it always to be set out in the charging document. State v. Waters, supra, 436 So.2d at 68-69.

In addressing the second certified question, this Court modified the question to read as follows: "In a trial on a charge of burglary, is proof of the factual elements set out in Section 810.07 sufficient to establish a prima facie case of intent to commit an offense?" This Court responded in the affirmative:

> In State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980), the court concluded that Section 810.07 provided an alternative

> means of alleging the crime of burglary. The court was proceeding on the assumption, however, that a charge under Section 810.02 requires a specification of the offense intended. Since in the present decision we abrogate the rule that the allegation of intent in a charge of burglary must always specify the offense intended, the basis of Fields court's suggestion is now removed. All indictments and informations charging burglary must allege the essential element of intent as set forth in the statutory definition. See Rozier v. State, 402 So.2d 539 (Fla. 5th DCA 1981). Section 810.07 only comes to operation as an alternative means of proving the element of intent. State v. Fields, 436 So.2d at 70.

The remaining question of whether the State could employ Section 810.07 to prove intent where an information alleged intent to commit a specific offense was first addressed by the Second District Court of Appeal in Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983). Bennett had been apprehended inside a Lee County school. After being given his Miranda warnings, he admitted breaking into the school but maintained he did so only so that he could use a telephone. The State charged him with burglary, alleging in the charging document that he broke and entered with the intent to commit a theft. At trial, the jury found Bennett guilty as charged.

On appeal, the Second District of Appeal reversed Bennett's conviction and ordered that he be discharged. In doing so, the court interpreted the Waters decision:

We read Waters to stand for three seperate, though interrated, propositions. First, when the State, either by indictment or by information, charges someone with burglary, the State need not allege that the accused intended to commit a specific offense after the breaking and entering occurs. For example, the State may or may not allege in the charging document that the accused broke and entered with the intent to commit an offense therein, to wit: sexual battery. Second, if the State does not allege that the accused intended to commit a specific offense Section 810.07 may be used as an alternative method to prima facie establish that a defendant has the intent to commit an unspecified offense after the breaking and entering occurs. Third, if the State charges that a defendant did intend to commit a specific offense after the breaking and entering occurs, then the State must prove that the defendant did in fact intend to commit this offense. Furthermore, when the State does so charge, the proof must be established without the benefit of Section 810.07.

* * *

Our interpretation of Waters requires us to reverse appellant's conviction. This is so because the State's information charges the Appellant "did unlawfully enter or remain in a certain structure to wit: Park Meadow School... with the intent to commit an offense therein, to wit: Theft." Thus, the State specifically alleged that appellant intended to commit a specific offense once the breaking and entering occurred. Having done so, the State was required to prove that appellant had the intent to commit the theft. In Waters, the defendant's burglary conviction was affirmed because the State demonstrated that the circumstances present in that case could only lead to the conclusion

> that the defendant did intend to commit a theft. Here, the circumstances are a somewhat different. They do not isolate the intended crime of theft here as it did in Waters, for here the appellant could have intended to commit any number of offenses. For example, he could have as easily broke in and entered the school to commit arson or otherwise destroy school property. In addition, he could have merely intended to use the telephone, as he stated at trial during the course of his unrebutted testimony. Since in Section 810.07 only applies when no specific offense is alleged in an information charging burglary, the State cannot rely on the presumption contained in that statute since here it has alleged a burglary with the intent to commit the specific offense of theft.
>
> Bennett v. State, supra, 438 So.2d at 1035-1036.

Against this background, the Third District Court of Appeal decided the present case. Faced with a factual situation identical to that in Bennett, the Third District Court of Appeal reviewed Waters decision and held:

> The supreme court did not address the precise question before us; however, insofar as it held that specification of the offense intended is not essential, we find that its inclusion in the charging document is surplusage and need not be proven. If the State were precluded from using the presumption by virtue of charging the intent to commit a specific offense, there would be no incentive for the State to ever enumerate the particular offense. We hold, therefore, that when the State charges that the defendant did intend to commit a specific offense after the breaking and entering,

> it may avail itself of section 810.07.We disagree with our sister court in Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983) to the extent that it holds otherwise.
>
> L.S. v. State, supra 446 So.2d at 1148-1149.

The L.S. decision is eminently correct. The Waters decision of this Court makes patently clear that the inclusion of a specific offense is unnecessary to establish the intent requirement. So long as the State alleges and proves the essential element of entry of a structure with intent to commit an offense therein, a burglary has been proved. Specification of a particular offense intended being not essential, its inclusion in the charging document truly does constitutes nothing more than surplusage. The Third District Court of Appeal's reliance on the general rule that allegations not essential to the crime charged need not be proven was accurate. United States v. Goodman, 605 F.2d 870 (5th Cir. 1979); United States v. Brown, 604 F.2d 557 (8th Cir. 1979).

The Bennett Court's analysis failed to address the issue of surplusage. Instead, the Bennett Court blindly asserted that the Waters decision required the State to prove intent to commit theft. Nothing, however, about Waters suggests such a proposition. Additionally, the alleged distinction between the facts in Bennett and in Waters simply does not exist. For example, Waters could just has easily have been said to have been en-

tering the residence to use the phone, as suggested in Bennett. In sum, the Bennett Court offered nothing to substantiate or support its ruling.

In the present case, the only true argument advanced by the Petitioner to support his position is that adoption of the Third District Court of Appeal position would permit the State to "sandbag" defendants who had relied on the charging document to prepare their case. (Brief of Petitioner, page 9). The same reason that prevented a vagueness argument in the Waters decision also answers the Petitioner's sandbag argument in the present case. This Court has adopted broad reciprocal discovery procedures which permits criminal defendant's a means to avoid suprise or embarrassment in the preparation of a defense than just the terms utilized in a charging document. The use of depositions and other discovery vehicles provides defendants with the ability to determine what the State will show at trial. Where such vehicles are available, a defendant should not be permitted to rest solely on the charging document to build a defense.

The purpose of the burglary statute is to "punish the invasion of possessory property rights of another's structure or conveniences", State v. Hankins, 376 So.2d 285 (Fla. 5th DCA 1979), as opposed to ownership rights. Anderson v. State, 356 So.2d 382 (Fla. 3d dCA 1978). See also Vazquez v. State, 350 So.2d 1094 (Fla. 3d DCA 1977). The property rights of an

individual have been invaded once an intruder actively attempts to gain illegal entrance to the property of another. The particular crime to be committed within an illegally entered property adds nothing to the charge of burglary except to offer a logical explanation as to why the illegal entrance was made.

Teh burglary is complete when a defendant illegally enters another's premises intending to commit any offense therein, regardless of what specific offense the intruder intends to commit. Since the specific offense is not germane to the commission of a burglary, a requirement that the specified offense be both alleged and proven defies the very purpose of the burglary statute.

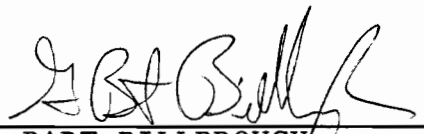
Like motive, the specific offense intended maybe helpful to the State's case, but is not necessary for conviction.

CONCLUSION

Based upon teh foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General

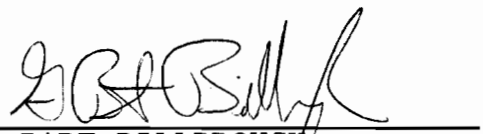


G. BART BILLBROUGH
Assistant Attorney general
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128

(305) 377-541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished my mail to SHARON B. JACOBS, Esquire, 114 Giralda Avenue, Coral Gables, Florida 33134 on this 23rd day of August, 1984.



G. BART BILLBROUGH
Assistant Attorney General

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