o/a 12-6-84

IN THE SUPREME COURT
STATE OF FLORIDA

In the Interest of:

L.S., a Juvenile,

Appellant, Petitioner,

vs.

THE STATE OF FLORIDA,

Appellee, Respondent.
_____/

CASE NO. 65,183
(Third DCA Case No. 83-2076)

* * *

APPLICATION FOR CONSTITUTIONAL CERTIORARI
TO THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

* * *

BRIEF OF PETITIONER ON THE MERITS

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WHETHER IN A TRIAL ON A CHARGE OF BURGLARY, PROOF OF THE FACTUAL ELEMENTS SET OUT IN §810.07, FLA. STAT., IS INSUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF INTENT WHERE THE CHARGING DOCUMENT SPECIFICALLY ALLEGES THAT THE ACCUSED BROKE AND ENTERED A STRUCTURE OR DWELLING WITH THE INTENT TO COMMIT THEFT.

STATEMENT OF THE CASE

Petitioner, L.S., a juvenile, seeks to have reviewed a decision of the District Court of Appeal, Third District, dated March 13, 1984 (Said opinion is contained in the Appendix at p.4.). The petitioner herein was the original respondent below and the appellant before the District Court of Appeal. The respondent herein, the State of Florida, was the original petitioner in the trial forum and was the appellee before the District Court of Appeal.

L.S., a fourteen year old child, was charged on June 15, 1983 in a two-count Petition for Delinquency for (1) "theft" and (2) "burglary" in violation of §812.014 and 810.02, Fla. Stat. (1981), respectively. (R.1).

Count I charged L.S. with grand theft, i.e., knowingly, unlawfully and feloniously obtaining, using or endeavoring to obtain or use certain property of Ms. Hortense Robinson with the intent of either temporarily or permanently depriving her of the property, pursuant to §812.014, Fla. Stat.

Count II charged L.S. with burglary, i.e., unlawfully entering or remaining a dwelling without consent and with the intent to commit an offense therein, to wit: THEFT, in violation of §810.02, Fla. Stat. [Emphasis added.] (Said Petition is contained in the Appendix at p.2.)

L.S. was tried without jury before the Honorable Seymour Gelber, judge of the Eleventh Judicial Circuit In and For Dade County, Florida, Juvenile Division, on July 28, 1983. A plea of denial was entered.

At trial, with regard to the burglary charge, the state relied upon the presumption provided by §810.07, Fla. Stat.,[1] and took the position that it need not prove that the juvenile had the intent to commit any specific offense even though the charging document specifically alleged that he had the intent to commit theft when he broke and entered.

Defense counsel moved for directed judgment of acquittal based on the insufficiency of evidence to sustain a conviction for either burglary or theft, and inter alia, that:

> (a) The Petition charged L.S. with breaking and entering with the intent to commit theft; however, the state produced evidence to show, at best, stealthful and non-consentual entry. Such fatal variance should result in judgment of acquittal. (R. 37).
>
> (b) The state could not now rely on the presumption of intent, provided in §810.07, Fla. Stat., where no such charge was made in the Petition.

All motions for judgment of acquittal were denied by the court (R.37). The trial court found that the evidence supported both allegations in the petition. Therefore the court adjudicated L.S. delinquent and sentenced him to the custody of HRS.

Petitioner, L.S., a juvenile, timely appealed to the District Court of Appeal, Third District. On appeal, the state conceded that there was insufficient evidence to support an adjudication for the count of theft.

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[1]Section 810.07, Fla. Stat., provides:

> In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof shall be prima facie evidence of entering with intent to commit an offense.

In its opinion of March 13, 1984, the District Court of Appeal, Third District, accordingly reversed as to the count of theft, but upheld the burglary adjudication, acknowledging that the court had come to an opposite conclusion from that of another District Court concerning the same factual and legal question. See, Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983) (said opinion is contained in the Appendix at p.7). The trial court order was therefore reversed in part, and affirmed in part.

L.S. timely filed a Notice to Invoke the Discretionary Jurisdiction of this court to determine the express and direct conflict between two district courts of appeal on the same point of law.

Subsequent to the filing of briefs on jurisdiction the Fifth District court of Appeals decided Frederick v. State, __So.2d__ (Fla. 5th DCA June 28, 1984) [9 FLW 1412]. That case addresses the same question raised in this appeal and cites to the instant case, adopting the reasoning of the Third District Court of Appeal below.

This brief on the merits is submitted pursuant to this Court's Order of July 13, 1984 accepting jurisdiction and setting oral argument for December 6, 1984.

The record reflects that the dwelling of Ms. Hortense Robinson was broken into at some undetermined time during the early afternoon April 22, 1983. Ms. Robinson's house is located in the vicinity of 3031 N.W. 48th Terrace, Miami, Florida, directly across the street from a school (R.30).

Entry into Ms. Robinson's house was accomplished through the

window in the rear bedroom. Following the incident, the window sill from that window was dusted by police for fingerprints. (R.25-26). Of the six latent prints lifted, only two matched those of L.S.

Ms. Robinson reported loss of jewelry, a camera, a pen set and cash. (R.26-27).

Ms. Robinson's house had been burglarized during the week prior to the instant incident and at neither time, i.e., the prior or instant time, was anyone at home nor did anyone see either of the burglaries. (R.32).

At the time of trial, Ms. Robinson had already filed an insurance report with her insurance company. Ms. Robinson testified that her insurance company probably would not reimburse her for loss of cash (the only item stolen during the prior burglary); however, they would probably reimburse her for loss of the non-cash items lost during the instant incident. (R.34).

ARGUMENT

IN A TRIAL ON A CHARGE OF BURGLARY, PROOF OF THE FACTUAL ELEMENTS SET OUT IN §810.07, FLA. STAT., IS INSUFFICIENT TO ESTABLISH A PRIMA FACIE CASE OF INTENT WHERE THE CHARGING DOCUMENT SPECIFICALLY ALLEGES THAT THE ACCUSED BROKE AND ENTERED A STRUCTURE OR DWELLING WITH THE INTENT TO COMMIT THEFT.

Petitioner, L.S., a juvenile, was charged by a Petition for Delinquency with, inter alia, burglary as per Section 810.02 Florida Statutes:

> "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

The Petition for Delinquency alleged that the juvenile

> did unlawfully enter or remain in a certain structure, to wit: A Dwelling, the property of Hortense Robinson, as owner or custodian, located...with the intent to commit an offense therein, to wit: THEFT...

R.1, App. 2.

L.S. denied the accusation. The State did not introduce one piece of evidence which could connect L.S. with any of the items allegedly missing from the dwelling.[2] There were no eyewitnesses who could identify L.S. as entering the dwelling.

The only evidence connecting L.S. with this offense was that his fingerprints were found on the windowsill. Therefore there was not

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[2]The Third District Court of Appeal, in fact, reversed the adjudication for Theft on the grounds of insufficiency of the evidence.

one shred of evidence adduced at trial which would even tend to show that there was an intent to commit theft upon entering. Nonetheless the court below denied Petitioner's Motion for Judgment for Acquittal even though the state utterly failed to establish a prima facie case with regard to the element of intent. The court below allowed the state to rely upon the presumption of Section 810.07, Florida Statutes, that evidence of stealthy entry without consent is prima facie evidence of an intent to commit "an offense" notwithstanding that here, the state specifically charged that L.S. had entered with the intent to commit "theft."

In State v. Waters, 436 So.2d 66 (Fla. 1983), this court held that an information charging burglary need not always specify the offense the defendant is alleged to have committed, although it must always allege intent to commit an offense. See also, Rosier v. State, 436 So.2d 73 (Fla. 1983). This court, however, left open the question of whether the state may avail itself of the presumption of §810.07, Fla. Stat., where the charging document alleges that the accused broke and entered with the intent to commit the specific offense of theft.

In Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983), the District Court of Appeal, Second District, considered a set of facts almost identical to the ones in the instant case. In Bennett the state charged the accused with burglary, alleging in the charging document that he broke and entered with the intent to commit theft.

The District Court of Appeal for the Second District, relying upon this court's decision in Waters, supra., held that since

§810.07, Fla. Stat., only applies when no specific offense is alleged in the information charging burglary, the state cannot rely on the presumption contained in that statute since in Bennett the state alleged a burglary with the intent to commit the specific offense of theft. Bennett, supra., at 1036.

The District Court of Appeal, Second District, interpreted Waters to stand for the following propositions:

> We read Waters to stand for three separate, though interrelated, 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 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 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 intend to commit this offense. Furthermore, when the state doses so charge, the proof must be established without the benefit of section 810.07.

Bennett v. State, 438 So.2d at 1035. [Emphasis added.]

The District Court of Appeal, Second District also based its reasoning upon this court's decision in Justus v. State, 438 So.2d 358 (Fla. 1983). There this court held that the state is not required to set forth a specific felony that is intended to be committed or facilitated by means of the kidnapping pursuant to

§787.01(1)(a)(2), Fla. Stat. (1977).

The same point of law as considered in Bennett, supra., was involved in the instant case. Here the District Court of Appeal, Third District, when faced with the same facts as the Second District Court of Appeal in Bennett, held that the state may avail itself of §810.07, Fla. Stat., even when it charges that a defendant did intend to commit a specific offense after the breaking and entering. The Third District Court of Appeal expressly held:

> 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, No. 83-2076, slip. op. at 3; (App. 6). But see, Frederick v. State, __So.2d__ (Fla. 5th DCA June 28, 1984) [9 FLW 1412].

Here, just as in Bennett, supra., the State's petition for delinquency charged in count II that L.S., a juvenile, "did unlawfully enter or remain in a certain structure, to wit: a dwelling...with the intent to commit an offense therein, to wit: THEFT..." Thus, the State specifically alleged that L.S. intended to commit a specific offense once the breaking and entering occurred.

Here, the only evidence linking petitioner to the offense was two of his fingerprints found just inside the windowsill. There was a stipulation below that the position of the two fingerprints found on the windowsill was consistent with both a person on the outside of the building placing his hand inside the window or a person inside the building (R. 23). There were no eyewitnesses. No property belonging to the owner of the dwelling was found to be within

the possession or control of petitioner. Moreover, the owner of the dwelling, Ms. Robinson, testified that she knew that the fourteen-year-old L.S. lived in her neighborhood (R. 27). The residents of the neighborhood are mostly elderly (R. 31), but since the house is located directly across the street from an integrated school (R. 30) there are a number of children around (R. 32). Ms. Robinson testified that on other occasions she had seen L.S. "standing on the corner, right there, at the school." (R. 31.)

Therefore, petitioner (1) could have intended no harm, (2) could have intended to commit any number of offenses after the breaking and entering or (3) had any legitimate reason to enter. For example, he could as easily have broken and entered the structure to commit arson as to use the telephone. The juvenile also could have at some time[3] merely pushed open the window screen, and stuck his hands inside with no criminal intent whatsoever.

The State cannot rely on the presumption contained in §810.07, Fla. Stat., since it alleged a burglary with the intent to commit the specific offense of theft. The state should not be allowed to sandbag the defense by including a specific allegation with regard to intent in the charging document and then at trial relying upon a presumption of a different intent. Here L.S. relied upon the charging document in preparing his defense. The Petition for Delinquency alleged that the breaking and entering was accomplished for the purpose of commiting the specific offense of

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[3]The record is clear that this same house was burglarized just one week earlier (R. 3). Although Ms. Robinson testified that she wiped the windowsill (R. 28) there was no evidence presented that mere dusting would eradicate fingerprints which may have been placed there earlier.

theft. L.S. was successful in showing that there was no evidence that he actually committed theft.[4] Therefore if the state was held to the elements of the offense charged, it would also have to be found that L.S. could not be adjudicated of "breaking and entering with intent to commit theft."

L.S. would have prepared for trial differently if he had had prior notice that the state was actually relying upon the presumption of §810.07, Florida Statutes, rather than upon the specific allegations in the charging document.

It is well established that where the state charges a defendant with violation of a specific section of a statute, it cannot attempt to substitute a different provision as proof of violation of the section alleged.

> Where the information in a criminal case identifies with particularity the exact section of the statute upon which the charge is based, no other statute can be substituted for the one actually selected as forming the subject matter of the prosecution.

King v. State, 104 So.2d 730, 732 (Fla. 1957).

In King, supra., the state, by their information, charged the defendants with conspiracy to violate two statutes relating to bookmaking and the unlawful keeping or maintaining of a place for the purpose of gambling. However, at trial, the state produced evidence as to the defendants' alleged violation of a statute prohibiting conspiracy to misuse defendants' official positions. The Court, in

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[4]The Third District Court of Appeal reversed the adjudication on Count I of the Petition for Delinquency for the offense of "Theft." See opinion below, slip opinion at p.3; App. 6.

reversing the defendants' conviction, held that the state failed to prove any violation of the statutes specifically charged and that the state's attempt to prove these violations by reference to possible violations of other statutes was improper. Thus, according to the Court, where the information is specific, the state is bound to prove the violations charged and none others may be substituted.

State v. Waters, 436 So.2d 66 (Fla. 1983) should not be construed to relieve the state of its burden to prove the specific intent that it alleges in the charging document. Such variance between the allegations and the proof is a fatal flaw, requiring reversal in the instant case.

CONCLUSION

Based upon the foregoing authorities and arugments, this Honorable Court should vacate the adjudication of delinquency imposed upon L.S., a child.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 2nd day of August, 1984, to G. Bart Billbrough, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida, 33128.

By Sharon B. Jacobs
SHARON B. JACOBS, ESQ.