OA 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

* * *

REPLY BRIEF OF PETITIONER, L.S.

* * *

SHARON B. JACOBS, ESQ.
CHAYKIN, KARLAN & JACOBS
Attorneys for Petitioner, L.S.
114 Giralda Avenue
Coral Gables, Florida 33134
(305) 446-1220

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHEN THE STATE CHARGES AN INTENT TO COMMIT A SPECIFIC OFFENSE IN AN INFORMATION, THE PROOF CANNOT VARY AT TRIAL.

ARGUMENT

WHEN THE STATE CHARGES AN INTENT TO COMMIT A SPECIFIC OFFENSE IN AN INFORMATION, THE PROOF CANNOT VARY AT TRIAL.

The state, in its answer brief, argues that it should be allowed to "sandbag" the Petitioner in this case because he was so foolhardy as to rely upon the plain meaning of the Petition for Delinquency filed against him. The state misplaces reliance on this court's broad discovery rules to support its erroneous position that "where such [discovery] vehicles are available, a defendant should not be permitted to rest solely on the charging document to build a defense" [State's Answer Brief at p. 13].

The state, however, fails to consider that the purpose of a Motion for Bill of Particulars is to cure otherwise vague or unclear language in the charging document. Here, there was no vague defect in the language of the charging document. The Petition for Delinquency clearly charges L.S. with unauthorized breaking and entering with the intent to commit "theft" (R.1; App. 2).[1] There was no ambiguity in the charging document as to the nature of the alleged specific intent, and therefore no need for defense counsel to file a Motion for Bill of Particulars. The state erroneously suggests that, here, L.S. should have requested a Bill of Particulars to determine whether the state really meant what it

---

[1]References to the Record-on-Appeal are cited as "R.__", and references to the Appendix are cited as "App.__".

stated in plain English in its charging document. The state's suggestion is ridiculous and, if adopted, would create a burden on the administration of justice by requiring the routine filing of unnecessary discovery pleadings.

First of all, a defendant's constitutional right to be informed of the nature of the cause of the accusation against him requires that every material fact and essential element of the offense be charged with precision and certainty. This right, based on the presumption of innocence, requires such definiteness for the purpose of enabling a presumptively innocent man to prepare for trial. An information which "fails to sufficiently apprise a defendant [so as] to enable him to prepare a defense" will be dismissed or the state will be ordered to file a statement of particulars. Jent v. State, 408 So.2d 1024 (Fla. 1981). See, Fla.R.Crim.P. 3.140(n).

The Florida Rules of Criminal Procedure provide that the court, upon motion, shall order the prosecuting attorney to furnish a statement of particulars, only when the indictment of information fails to inform a defendant of the particulars of the offense sufficiently to enable him to prepare his defense. Fla. R.Crim.P. 3.140(n). However, the grant of such motion is within the discretion of the judge[2] and a defendant has the burden to first show by affidavit that certain terms in the charging document are unclear or require amplification.

Here the charging document (R.1; App. 2) is perfectly clear in

---

[2]Winslow v. State, 45 So.2d 339 (Fla. 1949).

that it specifies precisely the specific offense which the state alleges L.S. intended to commit upon breaking and entering, that is "theft".[3] Therefore the state fully apprised L.S. in the Petition for Delinquency (R.1; App.2) as to the accusations against him and he had an organic right to rely upon those unambiguous terms in the preparation of his defense.

In the instant case, L.S. was prejudiced when the state, at trial, relied upon the presumption of §810.07, Fla. Stat., that evidence of stealthy entry was prima facie evidence that L.S. intended to commit "an offense", rather than prove an intent to commit "theft" as alleged in the Petition for Delinquency.

L.S. would have prepared his defense differently if he had known that the state intended to rely upon §810.07, Fla. Stat. For example, defense counsel stipulated to the state's introduction into evidence of certain fingerprint evidence. Counsel did so in reliance upon the information in the Petition for Delinquency that the state intended to prove an intent to commit theft. Counsel's strategy therefore was to show that not one piece of stolen property was found within the possession or control of L.S. or otherwise connected to him[4]. If defense counsel had known that the

---

[3]The facts in this case are opposite to those considered in Williams v. State, Case No. 84-31, __So.2d__ (Fla. 5th DCA Aug. 1, 1984) [1984 FLW 1674] (State filed an Amended Information which deleted reference to the specific offense which Williams allegedly intended to commit within burglarized premises, and the defense did not utilize discovery vehicles to prepare his defense.)

[4]The decision below of the Third District Court of Appeals reversed the adjudication for the count of theft. L.S. v. State, 446 So.2d 1148 (Fla. 3d DCA 1984), See also, App. 4-7.

state would be allowed to prove the charge of burglary, by merely proving stealthy entry, then defense counsel would have sought to exclude the fingerprints or to carefully cross-examine the technician who identified the fingerprints as belonging to L.S. and further to pinpoint the exact location and direction of the fingerprints.

Consideration of this Court's rules of discovery and principles of fairness require that a defendant be permitted to rely upon those allegations in a charging document which are clear and unambiguous. Here, if the state had offered evidence at trial of an intent to commit arson instead of theft, L.S. would have been entitled to a Directed Verdict based on a fatal variance between the charging document and the proof. Likewise, here, where the state merely offered evidence of stealthy entry which creates a presumption of an intent to commit "an offense" under §810.07, Fla. Stat., there is also a fatal variance between allegations contained in the Petition for Delinquency and the proof.

This court, in Waters v. State, 436 So.2d 66 (Fla. 1983), and Rosier v. State, 436 So.2d 73 (Fla. 1983), held that an information or indictment charging the offense of burglary satisfies the sufficiency requirement as to intent so long as it alleges that the accused broke and entered "with the intent to commit an offense." In that situation, unless the defendant is otherwise apprised, the state is permitted to rely upon the presumption created by §810.07, Fla. Stat.

Petitioner, L.S., requests this court to resolve the conflict

among the district courts of appeal regarding a related but different situation, that is, whether the state is precluded from relying upon the presumption created by §810.07 Fla. Stat. where, as here, the charging document specifically puts the accused on notice that the state intends to prove that the accused broke and entered with the intent to commit "theft", and no other crime. There is no sound reason to allow the state to "sandbag" L.S.

CONCLUSION

For the aforestated reasons and authorities, L.S. respectfully requests this court to reverse the adjudication of delinquency based upon burglary entered by the trial court.

Respectfully submitted,

CHAYKIN, KARLAN & JACOBS
Attorneys for Petitioner,
L.S., a child
114 Giralda Avenue
Coral Gables, Florida 33134
(305) 446-1220

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of September, 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.