IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,323

Fifth District Court of Appeal
Case No. 83-1821

FILED
SID J. WHITE
JUL 16 1984
CLERK, SUPREME COURT
By

Chief Deputy Clerk

HOWARD REED,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

No further elaboration on the statement of the case and statement of the facts is required beyond that contained in our main Brief.

ARGUMENT

POINT I

WHETHER A DEFENDANT CHARGED WITH CRIMINAL MISCHIEF IS ENTITLED TO A TRIAL BY JURY UNDER ARTICLE I, SECTION 16, FLORIDA CONSTITUTION OR UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The State, in its response to the Petitioner's Brief on the Merits, contends that it is not necessary to consider the question of whether the Petitioner is entitled to a trial by jury under the Federal Constitution, the State contending that it is not within the ambient of the certified question and that question was not raised in the court below. This Court in Whirley v. State, ____So.2d____, 9 FLW 191 (1984), recognized that under the Federal Constitution a trial by jury is mandated in four classes of crimes: (1) crimes which were indictable at common law; (2) crimes that involve moral turpitude; (3) crimes that are malum in se, or inherently evil at common law; or (4) crimes that carry a maximum penalty of more than six (6) months in prison. The District Court, below, recognized that Reed had argued that he had a right to trial by jury under the Federal Constitution. The issue, then, of whether the Federal Constitution mandated a trial by jury was specifically ruled upon and was before the District Court of Appeal.

The contention of the State that this is not a matter which may be considered by this Court because it was

not within the narrow confines of the certified question has previously been answered by this Court in Hillsborough Association for Retarded Citizens v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976), and Rupp v. Jackson, 238 So.2d 86 (Fla. 1970), which hold that the scope of review by this Court extends to the "decision" of the District Court, rather than the question on which it passed or certified. Therefore, the question before this Court is the correctness of the decision of the District Court which, in essence, held that malicious mischief was a petty offense and, thus, also held that malicious mischief does not fall within any of the four classifications of crime which require a trial by jury under the Federal Constitution or which through the holding of this Court in Whirley require a trial by jury under the State Constitution.

In Petitioner's principal Brief there was noted the possibility that courts might interpret the law to focus only on the maximum penalty of a crime or whether it was indictable at common law. This apprehension voiced in the main Brief is borne out by the State's response which focuses exclusively on only three points, the maximum penalty, whether crimes against "property" are indictable at common law and alleged policy reasons why trials by jury are regarded to be inefficient and discarded as an archaic nineteenth century concept. The State does not respond to the

point made by the Petitioner that malicious mischief is one which involves moral turpitude and is a crime that is malum in se, or inherently evil at common law. Since it is apparently uncontradicted that malicious mischief is a crime that is malum in se or a crime which involves moral turpitude, under Whirley a trial by jury would be required for these reasons alone.

It is obvious that there are crimes against "property" which, at common law, required a trial by jury, arson and larceny being but two examples. Thus, any analysis of whether a particular offense required a trial by jury at common law requires a consideration of the particular crime and not resort to the broad category to which the State would point. As pointed out in our main Brief, malicious mischief was recognized as a crime at common law for which a trial by jury would be afforded. Malicious mischief is distinguished from other lesser crimes against property by the presence of malice. As we originally noted, the unintentional destruction of property does not carry with it the element of maliciousness and, thus, was only malum prohibitum as opposed to malum in se.

Accordingly, it is respectfully submitted that the principal error of the District Court was its characterization of malicious mischief as being a "petty" offense within the meaning of the State and Federal Constitutions. It is

clear from Whirley as well as Duncan v. Louisianna, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), that malicious mischief is not a "petty" offense. The presence of only one factor is required to take it out of the classification of petty offense and make it serious for which both the State and Federal Constitutions mandate a jury trial. In this particular case the State, apparently, does not contest that the offense is malum in se or involves moral turpitude and, from the authorities cited in our principal Brief, it is clear that malicious mischief was an indictable offense at common law, much akin to the crime of arson. Therefore, it is respectfully submitted that under Whirley the Petitioner was entitled to a trial by jury and the decision of the District Court, below, reversing the decision of the Circuit Court granting him such a trial by jury should be reversed.

POINT II

WHETHER A DEFENDANT IS ENTITLED TO A TRIAL BY JURY PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.251.

The State in its Brief has contended that the offense of malicious mischief is not "a crime" in either the constitutional sense nor within the purview of the Florida Rules of Criminal Procedure as to which a trial by jury should be given.

It is clear that the Legislature may declare any offense to be a "crime" and can legislatively grant the right to a trial by jury. The Legislature and this Court have both recognized, through the enactment of legislation or enactment of the various rules of procedure, that there are certain offenses for which a trial by jury is not constitutionally mandated. The Legislature has recognized the Florida constitutional provision which specifies "in all criminal prosecutions, the accused shall * * * have the right to have a speedy and public trial by an impartial jury in the county where the crime was committed". The Legislature has the right to declare what is a crime in the constitutional sense and, thus, has taken upon itself to make such a determination. Under Florida Statutes 775.08 the Legislature has defined the term "felony", the term "misdemeanor", the term "non-criminal violation" and the term "crime". Under Florida Statutes 775.08 (4) the term "crime" is defined to "mean a

felony or misdemeanor". It is respectfully submitted that through the enactment of Florida Statutes 775.08 Legislature intended that there be no jury trial, except as otherwise provided, for a violation of Chapter 316, Florida Statutes, the violation of any municipal or county ordinance, or any "non-criminal violation". In all other aspects, the Legislature has clearly indicated that anything which is punishable by a term of imprisonment, whether in a State correctional facility or in a county correctional facility, is encompassed within the term "crime" and would, thus, under the Constitution be entitled to a trial by jury and as to which this Court has indicated that the Rules of Criminal Procedure apply and as to which a trial by jury is mandated.

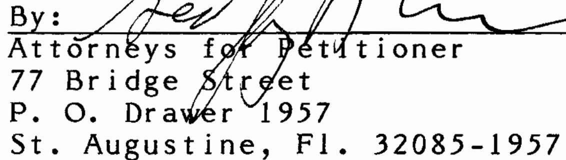
Thus, it is respectfully submitted that the Legislature has determined a classification of offenses which, assuming arguendo they were not constitutionally required to have a trial by jury, has been extended to include a trial by jury.

CONCLUSION

It is respectfully submitted, for the reasons stated above, that malicious mischief is not a "petty offense" under the meaning of the Whirley decision and under the meaning of applicable United States Supreme Court decisions interpreting the Sixth Amendment to the Constitution as made applicable to the States by the Fourteenth Amendment. It is further submitted, for the reasons stated in our principal Brief, that the decision of the District Court of Appeal, Fifth District, should be reversed and that the decision of the Circuit Court of the Seventh Judicial Circuit, in and for St. Johns County, Florida, should be reinstated mandating that the Petitioner is entitled to a trial by jury.

Respectfully submitted,

MEREDITH & DOBSON



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Margene A. Roper, Assistant Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by United States Postal Service, postage pre-paid, this 13th day of July, A. D., 1984.