IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 65-358

T.L.J., A CHILD,

Respondent.

PETITIONER'S BRIEF ON ~~JURISDICTION~~ Merits

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PRELIMINARY STATEMENT

The record in the instant appeal will be referred to by the symbol "R".

STATEMENT OF CASE

Respondent was charge with burglary by petition on July 14, 1983. (R 3) After Respondent was found guilty of committing the delinquent act of burglary an appeal was taken to the Second District Court of Appeal. (R 5, 64-5) On Appeal the Second District reversed the trial court's adjudication of delinquency. A notice to invoke the discretionary jurisdiction of this Court was filed on May 18, 1984. On October 24, 1984, this Court accepted jurisdiction and dispensed with oral argument.

STATEMENT OF THE FACTS

On June 13, 1983 at approximately 4:30 a.m., Holly Jo Van Sant woke up after feeling somthing on her leg and saw the Respondent run out of her trailer. (R 19-20) Ms. Van Sant spoke with a Deputy Sheriff and said it was one of the three boys in the Respondent's family because it was "a colored person." (R 21) When Ms. Van Sant and the deputy went to the Respondent's family, the Respondent was wide awake with his clothes on and the rest of the children were in bed. (R 22-24) Latent fingerprints were taken from the north doorjamb on Mrs. Van Sant trailer. (R 31) A fingerprint expert determined that the print lifted from the north doorjamb were the Respondent's (R 47)

The Respondent was interviewed by Officer Vanderwall. The Respondent told the Officer that he had been sleeping outside in a car and had seen someone up by the Van Sant trailer. (R 33-34)

Respondent testified that he was not in the Van Sant trailer on the evening in question. The family's trailer was located at his father's worksite at a distance more that a block behind the victim's. when the police offficer went there the child told him that his brother was sleeping inside with their mother and could not have gone outside without Respondent, who was in the car at the time, seeing him. Respondent had gone back into the house to sleep when his mother finished cooking her husband's breakfast; the family had all gone back to sleep when Ms. Van Sant came and said Respondent's little brother had gone into her house. (R 56)

When Respondent mowed the Van Sant yard on a previous occasion, he ran out of gas before he finished the job. At that time, Ms. Van Sant told him to come to the trailer; he opened the screen door and knocked on the inside door. The child testified that he was never in her trailer or on the porch at any other time. (R 56-57)

Respondent was sleeping in the car because there were seven people - five children and their parents - in the family. Since the trailer was small and it was hot, he went outside to the car to make room for everbody to lie down. (R 57) Before he went back in, he saw a person up around the office which was about three trailers away from Van Sant's. Since several people lived in trailers at this construction site, it was not that ususual for people to be up early in the morning. (R 58-59)

The child slept in the car everytime the family stayed at the construction site with his stepfather. (R 59) When he cut the field behind the Van Sant house and needed more gasoline he went through the screen door onto the porch in order to knock on the main door. (R 60)

Following closing argument (R 61-64), the defense motions to dismiss and to exclude the fingerprint testimony were renewed and denied. (R 64) Respondent was found guilty as charged, adjudicated guilty and placed on probation. (R 64-65)

ISSUE

WHETHER §810.07 IS APPLICABLE WHEN THE ACCUSSATORY DOCUMENT ALLEGES THE SPECIFIC OFFENSE TO BE COMMITTED?

The Second District held in the case sub judice that since the accusatory document charging the Respondent with burglary alledged intent to commit a specific offense, "it may not rely upon the presumption afforded by section 810.07," Florida Statutes (1981). T.L.J. v. State, 449 So.2d 1008 at 1009 (Fla. 2nd DCA 1984). The Second District specifically relied upon Bennett v. State, 438 So.2d 1034 (Fla. 2nd DCA 1983), as authority. In Bennett the Second District interpreted this Courts decision in State v. Waters, 436 So.2d 66 (Fla. 1983) as follows:

> We read Waters to stand for...if the state charges that a defendant did intend to commit a specific offense after the breading and entering occurs, then the state must prove that the defendant did in fact intend to commit this offense. Furthermore, when the state does no charge, the proof must be established without the benefit of section 810.07

In Water this court held (1) that the state need not specify the offense the defendant intended to commit inside the structure; (2) that the elements set in §810.07 are "sufficient to establish prima facia evidence" of intent in a trial on a charge of burglary; and (3) in that specific case, there was circumstantial evidence from which the trier of fact could properly conclude that the defendant there attempted to enter with the intent to commit a theft. This

Court stated that §810.07 was inapplicable because the charge was attempted burglary and not burglary. This was because §810.07, Florida Statutes (1981), uses the language "on the charge of burglary" an this Court would not expand its application to attempted burglary because penal statutes are strictly construed. Waters at 70. Nowhere in this court's decision is there an explicit or implicit suggestion that §810.07 could not be used by the state when the accusatory pleading specified the crime intended to be committed upon entering the structure. Furthermore, this Court shouldn't expand Waters to deprived the state of the benefits of §810.07 Florida Statutes, because this would amount to judicial legislation and be contrary to the legislatures intent as expressed by §810.07.

In contrast to the Second District is position in Bennett and T.L.J., the Third and Fifth District Courts of Appeal have held that the state may rely on §810.07 when an accusatory pleading charges intent to commit a specific offense. L.S. v. State, 446 So.2d 1148 at 1149-50 (Fla. 3rd DCA 1984) and Frederick v. State, 451 So.2d 1066 (5th DCA 1984).

It should also be noted that the First District recently had the opportunity the interprete this courts decision in Waters and the Second District's decision in Bennett on a related issue. Toole v. State, ___So.2d___ (Fla. 1st DCA 1984) 9 F.L.W. 2073, opinion filed September 26, 1984. In Toole the First District agreed if the state charges intent to commit a specific offense after the breaking and entering

occurs, "the state must prove that the defendant did in fact intend to commit (that) offense". The First District's opinion in Toole must be interpreted in light of its decision in Brown v. State, 436 So.2d 1113 (Fla. 1st DCA 1983). In Brown the First District allowed evidence of a stealthful entry to provide evidence of intent to commit a crime even though the information charge the defendant in that case with intent to commit the crime of theft within the structure. As such, Petitioner submits that the correct interpretation of Waters should be that when the state charges intent to commit a specific offense it must prove intent to commit that specific offense and it may used §810.07 as an evidentiary alternative of proving intent to commit that specific offense. See State v. Clark, 442 So.2d 209 (Fla. 1983).

CONCLUSION

Based on the above-stated facts, arguments and authorities, Appellee would pray that this Honarable Court reverse the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Amelia G. Brown, Assistant Public Defender, Courthouse Annex, Tampa, Florida, 33602, this 7th day of November, 1984.

OF COUNSEL FOR PETITIONER