IN THE SUPREME COURT OF THE STATE OF FLORIDA

WILLIAM FREDERICK

Petitioner,

v

STATE OF FLORIDA,

Respondent.

CASE NO. 65,534
DCA Case No. 83-1432

RESPONDENT'S BRIEF ON MERITS

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

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CITATION OF AUTHORITIES

ARGUMENT

PETITIONER'S PROBATION REVOCATION WAS PROPERLY BASED UPON A CONVICTION FOR BURGLARY.

On August 13, 1983, the trial court found the appellant to be guilty of violating his probation for grand theft, pursuant to defense counsel's stipulation that the appellant had been found guilty of burglary in another circuit court trial. Appellant appealed his revocation of probation to the Fifth District Court of Appeal and on June 28, 1984, the revocation of probation was affirmed (R 7-8). The Fifth District Court of Appeal certified its decision in this case to be in conflict with T.L.J. v State, 449 So.2d 1008 (Fla. 2d DCA 1984), and Bennett v State, 438 So.2d 1034 (Fla. 2d DCA 1983) (R 7-8). The conviction for burglary has been appealed in Fifth District Court of Appeal Case Number 83-1431 and awaits decision.

The Petitioner first contends that the only evidence of property even being moved was the fact that a rusty cow bell had been moved from the back steps of the house to a table in the breakfast room which does not prove an unlawful intent to deprive the owner of its use and benefit, a finding required to support a theft conviction.

The question of a defendant's intent to steal is a question of fact to be determined by the trier of fact based upon all the circumstances shown by the evidence. Dobry v State, 211 So.2d 603 (Fla. 3d DCA 1968); Jones v State, 192

So.2d 285 (Fla. 3d DCA 1966); State v Waters, 436 So.2d 66 (Fla. 1983). In the case sub judice the circumstances shown by the evidence were such that the trier of fact was properly able to conclude that at the time the Petitioner unlawfully entered the residence, he intended to commit the crime of theft.

The crime of burglary under the present statute requires proof of an unconsented entering or remaining in a structure or conveyance with the intent to commit an offense therein. §810.02 Fla. Stat. (1981). In the case sub judice the victim's window adjacent to the back door, which was closed, had been opened and the screen had been taken off (CR 30-31). The front and back doors were locked and both bedroom doors were bolted (CR 16-17). The doorknobs of the doors leading to the victim's bedroom were both tried and jiggled by the burglar (CR 13-15). The Petitioner was actually observed slipping out the window by police officers (CR 30,31,39,40,50,58). The victim had given no one, least of all the Petitioner, permission to enter her home by that window at three-thirty in the morning (R 28;12).

In the absence of Florida Statutes Section 810.07 (1981), in order to constitute burglary the defendant must have had the intent to commit an offense in the structure or conveyance. § 810.02(1) Fla. Stat. (1981); See also, Ellis v State, 425 So.2d 201 (Fla. 5th DCA 1983). Because of the difficulty that has been presented to the State by

this element of the offense, the courts have been liberal in helping the State demonstrate the intent. In this regard, evidence that there was property in the building which could be the subject of a larceny has been held admissible. Turnette v State, 156 So. 538 (Fla. 1934); Tavalaccio v State, 59 So.2d 247 (Fla. 1952); Jones v State, 192 So.2d 285 (Fla. 3d DCA 1966). There are numerous other cases in which the accused burglar did not succeed in actually stealing anything, but where the specific intent to steal was held to have been proved by the circumstances, including the presence of property or goods available to be stolen. See Rebjebian v State, 44 So.2d 81 (Fla. 1949); Walker v State, 44 Fla. 466, 32 So. 954 (1902); Groneau v State, 201 So.2d 599 (Fla. 4th DCA), cert. denied, 207 So.2d 452 (Fla. 1967). In the case sub judice the victim testified that behind the bedroom doors the burglar tried, in her bedroom, were kept her valuables in the form of clothes, a watch and jewelry of an estimated value of one thousand dollars (CR 29).

Since the attempted burglary took place at 3:30 a.m. and the cow bell that had been kept on the back steps of the victim's house in the vicinity of the opened window had been moved inside to the breakfast room table where it could not be stumbled upon and inadvertently rung, and the burglar exited through the same window he entered rather than a door possibly causing noise, it may be inferred that the Petitioner

knew the victim was asleep and did not want to wake or provoke her, thus negating any intent to commit a crime against a person such as rape, murder, robbery, assault or battery. This may be especially inferred in view of the fact that testimony did not reveal that the Petitioner had a weapon in his possession, and by his retreat upon finding the bedroom doors bolted, rather than attempting to force them open. It is also possible the bell was asported for the purpose of reducing it to the burglar's possession along with other anticipated items within the residence. The Petitioner further had no explosives or flammable materials, thus negating any intent to commit the offense of arson. It is also well-settled that while intent to commit a specific offense is a necessary element of burglary, however, the intent need not be consummated, Robinson v State, 393 So.2d 33 (Fla. 1st DCA 1981). The circumstances shown are inconsistent with any hypothesis of intent to commit crimes except theft. But they are not inconsistent with the hypothesis that the Petitioner intended to commit theft.

The narrow issue before this Court, however, is whether or not the State can rely on the burglary presumptive intent statute when it has charged an intent to commit a specific offense. § 810.07, Fla. Stat. (1981).

In a case dealing with intent, State v Waters, 436 So.2d 66 (Fla. 1983), the information alleged that the respondent had attempted to unlawfully enter the dwelling of

another with the intent to commit the offense of theft. The case was also tried to the court sitting without a jury. The occupant of the dwelling testified that he caught respondent in the act of trying to break into his rented room which was locked with a padlock on the outside. Investigating officers testified that they observed evidence of the attempted breaking in the form of indentations and a bent padlock hasp on the door to the occupant's room. The occupant testified that his clothes, stereo phonograph, and television set were inside the room. This Court found that the circumstances were sufficient, such that the trier of fact could properly conclude that the defendant attempted to enter with the intent to commit theft. 436 So.2d at 73.

As previously stated in Waters, the information specifically alleged an intent to commit the offense of theft. The State argued that, nevertheless, pleading and proof of intent to commit a specific offense were unnecessary and that section 810.07, Florida Statutes (1979) could be relied upon to establish proof of the requisite criminal intent. The district court had certified to this Court the question of great public importance; whether the statutory rebuttable presumption contained in section 810.07, Florida Statutes (1979), is sufficient to prove a prima facie case of intent to commit the specified offense of theft. This Court in considering the question noted "in framing the certified question, the district court was mindful of the fact that in this case the information alleged intent to commit theft."

436 So.2d at 70. This Court, however, found section 810.07 inapplicable on its face because the charge was attempted burglary rather than burglary. In order to provide guidance to the lower courts, however, the Court responded to the certified question, but modified it 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?

436 So.2d at 70.

The Court answered the certified question in the affirmative stating:

> Thus section 810.07 provides the state with an alternative method of proving a charge of burglary when it is unable to adduce any evidence of the defendant's criminal intent when unlawfully entering a structure or conveyance. (Emphasis added).

436 So.2d at 70.

The Court, therefore, indicated by the above language that section 810.07 is properly utilized when the State is unable to adduce any evidence of the defendant's criminal intent. The Court did not limit or prohibit the use of section 810.07 in those cases in which an intent to commit theft or any other specific crime was alleged in an information. It would seem the Court, in this opinion, has created a rule not limited to those instances where the State realizes beforehand that it is unable to adduce evidence of criminal intent but also covering those cases where the state in an

abundance of confidence has specified the offense intended even though it was not required to do so and later finds impossible to prove. If the Court had intended such a limitation it would have spelled it out as in Waters an intent to commit a theft was alleged in the information and the actual question was whether under such a circumstance section 810.07 could be relied upon, albeit in the context of an attempted burglary.

The Petitioner contends that although the State need not have specifically alleged the intent to commit theft, once it did the prosecution was required to prove it, citing Bennett v State, 438 So.2d 1034 (Fla. 2d DCA 1983).

The Second District Court of Appeal in interpreting this Honorable Court's decision in Waters supra, in Bennett, held that the information charging that the defendant unlawfully entered or remained in a certain structure, to wit, a school, with the intent to commit an offense therein, to wit, theft, amounted to a specific allegation that the defendant intended to commit a specific offense once the breaking and entering occurred and, hence, precluded the State from relying on the presumption contained in the statute and required the State to prove that defendant had the intent to commit the theft, in the absence of which it was necessary to reverse the conviction and discharge the defendant. In Bennett, however, while it is clear that the information alleged an intent to commit a theft, it is not so clear whether

the information also pled section 810.07, Florida Statutes (1981).

In T.L.J. v State, No. 83-2112 (Fla. 2d DCA May 16, 1984) [9 FLW 1127] the Second District reiterated its holding in Bennett, noting its appreciation of the concern expressed by its sister court, the Third District Court of Appeal in a conflicting case, L.S. v State, 446 So.2d 1148,1149-50 (Fla. 3d DCA 1984), and also recognizing that "It further appears that by seeking a bill of particulars, a defendant may be able to circumvent section 810.07, Florida Statutes (1981), even when the State does not allege the intent to commit a specific offense," but nonetheless, the Second District felt constrained by the conclusion it reached in Bennett and its interpretation of State v Waters, 436 So.2d 66 (Fla. 1983).

The Fifth District Court of Appeal, however, agreed with the reasoning of the Third District Court of Appeal and held that the State may rely on the presumption, citing from L.S. v State, 446 So.2d 1148 (Fla. 3d DCA 1984):

> 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.

446 So.2d at 1149-50 (R 7).

The Third District held more narrowly that insofar as Waters held that specification of the offense intended is not essential, its inclusion in the charging document is surplusage and need not be proven. 446 So.2d at 1149.

The State would submit that the reasoning of the Third and Fifth District Courts of Appeal is the more reasonable approach. 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. The fact that in such instances a defendant may be able to circumvent section 810.07 by seeking a bill of particulars is not particularly significant as a bill of particulars is an unnecessary panacea contributing to delay in an already clogged-up criminal justice system, when specification of the offense intended can be pled initially without penalizing the State, and at the same time enlightening the defendant. Moreover, if specification of the offense intended is not essential to a charging document and the charging document does not become susceptible to attack by the deletion of the intent to commit a specific offense, it is eminently unfair to demand that the State prove that which is necessarily only surplusage in the first instance. There is also little difference between the State realizing beforehand that it is unable to adduce evidence of criminal intent or realizing later that such intent may be impossible to prove after having specified it.

Over-confidence is no basis for reversal, especially when it does no harm to a defendant and imparts to him knowledge otherwise not known.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court approve the decision of the Fifth District Court of Appeal, affirming the Appellant's revocation of probation and determining that the State can rely on the burglary presumptive intent statute, section 810.07, Florida Statutes (1981), when it has charged an intent to commit a specific offense.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARGENE A. ROPER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave.
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief On Merits has been furnished, by delivery, to Brynn Newton, Assistant Public Defender, 1012 S. Ridgewood Ave., Daytona Beach, Fl., 32014-6183, this 14th day of August, 1984.

MARGENE A. ROPER
COUNSEL FOR RESPONDENT