IN THE SUPREME COURT OF FLORIDA

WILLIAM FREDERICK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON, ASSISTANT PUBLIC DEFENDER
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ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the Appellant in the District Court of Appeal, Fifth District of the State of Florida, and Respondent was the Appellee. In this brief, Respondent will be referred to as "the State," and Petitioner will be referred to as he appears before this Honorable Court.

In this brief, the following symbols will be used:

R - Refers to record on appeal in DCA Case No. 83-1432.

SR - Refers to supplemental record on appeal in DCA Case No. 83-1432.

CR - Refers to record on appeal in DCA companion Case No. 83-1431.

STATEMENT OF THE CASE

Petitioner was placed on probation on June 26, 1978, for grand theft. (R 10) Upon Petitioner's stipulation that he had been found guilty of burglary at a trial before the bench, he was found guilty of violation of probation on Augus 3, 1983. (R 3-4) His probation was revoked and he was sentenced on September 22, 1983, to spend five years in prison. (SR 6; R 8-12) He timely appealed to the Fifth District Court of Appeal and on June 28, 1984, the revocation of probation was affirmed. (See Appendix.)

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 with Bennett v. State, 438 So. 2d 1034 (Fla. 2d DCA 1983).

STATEMENT OF THE FACTS

About 3:30 in the morning of May 8, 1983, Madalyn Scott awoke to hear the doorknob in one of her bedroom doors being turned. (CR 12, 40) About a minute later, the second bedroom doorknob was jiggled. (CR 15) The doors to her house were locked, and the bedroom doors were bolted. (CR 16, 17, 27) She said she kept her valuables, about one thousand dollars' worth, in her bedroom. (CR 29)

Ms. Scott called the police on her bedside telephone, and they arrived to see Petitioner exiting a rear window which had been closed but not locked. (CR 30, 31, 39, 40, 50, 58) Petitioner was wearing dark blue pants and shirt, and a pair of sneakers. (CR 48, 49) No one determined when it had happened, but the police noticed after Petitioner was outside that his pants zipper was down. (CR 41, 51, 52, 53, 59)

A rusty cow bell which had been kept on the back steps of Ms. Scott's house was found on the breakfast room table. (CR 21, 24, 27) None of her property was on Petitioner's person or removed from the house. (CR 53)

ARGUMENT

PETITIONER'S PROBATION REVOCATION WAS IMPROPERLY BASED UPON A CONVICTION FOR BURGLARY WHERE THE BURGLARY INFORMATION ALLEGED BUT THE EVIDENCE FAILED TO PROVE AN INTENT TO COMMIT A SPECIFIC OFFENSE.

The information filed against Petitioner charged that he:

> " . . . unlawfully, stealthily and without consent of the owner or occupant thereof, enter a structure, to-wit: A DWELLING, located at 1119 MAGNOLIA AVENUE, SANFORD, the property of MADALYN T. SCOTT, as owner or custodian, with intent to commit an offense therein, THEFT OR SEXUAL BATTERY, said A DWELLING [sic] being then occupied . . . . contrary to Sections 810.02(1), 810.02(3), and 810.07, Florida Statutes, . . . " (CR 104)

The trial court granted Petitioner's motion for a judgment of acquittal as to the charge of burglary with the intent to commit sexual battery, finding the evidence insufficient to prove Petitioner intended to commit that crime. (CR 88) The trial court, however, found Petitioner guilty of burglary with the intent to commit theft, even though Petitioner took no property from the residence. (CR 53, 92) The only evidence of property even being moved was the fact that a rusty cow bell had been moved from the house's back steps to the table in the breakfast room. (CR 21, 24, 27) The trial court stated that it was "speculation" as to why Petitioner did not take anything. (CR 91) Moving a rusty cow bell from the owner's back steps into the owner's house does not prove an unlawful intent to deprive the owner of its use and

benefit, a finding of which intent is required to support a finding of theft. State v. Dunmann, 427 So. 2d 166 (Fla. 1983).

Since the intent to commit the specific offense of theft was not proved by the State at Petitioner's trial, the issue framed by the Fifth District Court of Appeal in this case was 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). The Fifth District agreed with the reasoning of the Third District Court of Appeal, and held that the State may rely on the presumption since:

> 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.

L. S. v. State, 446 So. 2d 1148 (Fla. 3d DCA 1984).

In Bennett v. State, 438 So. 2d 1034 (Fla. 2d DCA 1983), the Second District Court of Appeal interpreted this Honorable Court's decision in State v. Waters, 436 So. 2d 66 (Fla. 1983), to stand for the propositions that the State need not allege the intent to commit a specific offense when making a charge of burglary but, if it does, the prosecution is required to prove intent to commit that particular offense. The Bennett Court found the Waters holding to be reasonable and not prejudicial to a defendant because:

> . . . any potential vagueness that may initially appear in the charging document may be remedied

> by filing a bill of particulars or by engaging in other approved methods of criminal discovery.

Bennett, 438 So. 2d at 1035.

The Second District Court of Appeal, further, specifically responded to the Third and Fifth District Courts' concerns expressed in L. S., supra, and in the decision in this case:

> We appreciate the concern expressed by our sister court. 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.

T. L. J. v. State, 449 So. 2d 1008 (Fla. 2d DCA 1984).

In other words, the Fifth and Third District Courts give no substantial reason for relieving the State of its burden of proving its allegations. If the prosecution does not charge the intent to commit a specific offense in a burglary information, it may be compelled to specify the intended offense anyway, by an order to provide a statement of particulars. Therefore, whatever document specifies the offense, the State is obligated to prove all the elements of the charge of burglary. Furthermore, this Honorable Court in State v. Waters, supra, expressed its expectation that the "traditional practice of specifying the offense will continue," because as a practical matter the evidence of intent will "generally show the intent to commit a specific offense."

Unlike the situation in Waters, where the evidence was sufficient to show an intent to commit theft because theft was the only offense the defendant could have intended to commit inside a padlocked, unoccupied room,

the facts and circumstances of this case do not isolate the intended crime of theft. Since the information filed against Petitioner specified that he intended to commit theft or sexual battery, the State could not, having failed to prove what it had charged, rely on the presumption contained in Section 810.07. Petitioner's conviction for burglary was invalid and the revocation of his probation, based thereon, must be set aside.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the Fifth District Court of Appeal's decision herein, vacate the trial court's order revoking Petitioner's probation, and remand this cause with directions that Petitioner's probation be reinstated.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery; and by mail to Mr. William Frederick, Route 8 Box 200, Daytona Beach, Florida 32014, this 25th day of July, 1984.

Brynn Newton

ATTORNEY