OA 4-12-85 017

IN THE SUPREME COURT OF FLORIDA

LINDA GAYLE ROYAL and
WILLIAM ELLISON,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,720

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

TOPICAL INDEX

AUTHORITIES CITED

AUTHORITIES CITED (cont'd)

OTHER AUTHORITIES CITED

SUMMARY OF ARGUMENT

This court should approve the decision of the Fifth District Court of Appeal, Royal et al v. State, 452 So.2d 1098 (Fla. 5th DCA 1984), in that such decision correctly applies the law in Florida as to robbery. Petitioners are incorrect in their assertion that the Fifth District, in affirming their convictions of robbery, relied upon any construction of section 812.13(3) Florida Statutes (1979), although other district courts have done so, and petitioners have failed to demonstrate that such construction is error.

In finding that the force used by petitioners sub judice was sufficiently contemporaneous with the taking of the stolen property, so as to sustain the convictions of robbery, the Fifth District acted in accordance with precedents not only of this court and other district courts of this state, but also with a number of other jurisdictions throughout the country. Reason and logic dictate that petitioners' hypertechnical argument regarding the timing of the taking and the force be rejected, in that those who utilize force to effectuate a taking are guilty of robbery, regardless of whether they initially seize the stolen items with force or whether they fight past the legitimate owners of the property with force, while possession of the stolen property is still in continuing dispute.

ARGUMENT

THE DECISION BELOW, ROYAL V. STATE, SHOULD BE APPROVED, IN THAT THE DISTRICT COURT CORRECTLY APPLIED THE LAW IN THIS STATE REGARDING ROBBERY

In their brief petitioners assert not only that this court must vacate the instant decision of the Fifth District Court of Appeal, and in so doing reverse their convictions of robbery and order their immediate discharge, but they also demand this court expressly disapprove recent decisions of all other district courts in this state which have, in the field of robbery, ruled in a manner with which they disagree. See Royal, supra: Ben v. State, 10 F.L.W. 123 (Fla. 2d DCA January 4, 1985); Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983); State v. Douglas, 337 So.2d 407 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 946 (Fla. 1977). Respondent finds such contemplated course of action unnecessary and unwarranted, in that the decisions above represent correct statements of the law in this state. This court should approve the decision below, in that the district court, in affirming petitioners' convictions of robbery, correctly rejected hypertechnical arguments regarding the desired timing of events in a robbery. In likewise rejecting petitioners' argument, this court will not only be aligning itself with the positions already taken by the district courts of appeal of this state, but this court will also be acting in harmony with other jurisdictions throughout the country which have recognized that a robbery is a continuous, indivisable criminal episode.

As petitioners note in their brief, the facts of this

case, set out in the district court opinion, involved a theft in which force or violence was used. Petitioners entered a mercantile establishment and stuffed various items of clothing into garbage bags with the intent to steal them. As Royal and Ellison proceeded past the cash registers, a store detective attempted to prevent their departure and was pushed aside by Ellison. The two then left the store and entered their vehicle outside in the parking lot. Several store employees then tried to recover the merchandise and prevent petitioners from departing. At this point, Royal produced a pistol and pointed it at the forehead of one of the employees. Because the automobile was disabled, petitioners fled on foot and were subsequently arrested. It has continuously been petitioners' position that at most they committed a petit theft and either an assault or battery, in that their taking of the property was complete prior to their usage of force, violence or assault.

The Fifth District correctly rejected this scenario and, in doing so, looked specifically to decisions of the First and Third District Courts of Appeal, State v. Douglas and Stufflebean v. State, respectively. In the first case, Douglas, the defendants, while in a food market, placed several pieces of meat in a shoulder bag and attempted to depart without paying. One of the managers, who had observed this incident, intercepted them at the front of the store and requested that they accompany him to the rear. As they progressed in that direction, one of the defendants struck the store employee; when he resisted, the other stabbed him. The two then exited the store and were arrested. The defendants

successfully argued to the trial court that they were not guilty of robbery, then as described in section 813.011 Florida Statutes (1973), in that the taking of the meat was complete before any assaults had taken place.

The First District refused to accept this premise, identical to that raised by petitioners sub judice, and reversed the trial court's order of dismissal. The court found that the force or violence had been concurrent with the taking, and that such taking had not terminated when the defendants had taken the meat, in that if they were to enjoy such stolen goods, they had to get them out of the market first. The defendants' crime was robbery, because, in order to get the meat out of the market, they had to use force to overcome the actions of the manager in interfering with their exit. The First, citing to a New Jersey decision, State v. Culver, 262 A.2d 422 (N.J. App. Div. 1970), observed that both reason and logic demand that where the owner of property takes action to prevent a thief from taking his goods from his premises, and the thief uses force in an effort to get away with the goods, the thief's use of force is concurrent with the taking, and the act, robbery. The district court refused to artificially divide up the transaction at issue into completed theft and subsequent assault, finding that a single occurrence or criminal offense had taken place.[1]

[1] It is interesting to note that Douglas, like Culver, has had influence outside the state in which it was decided. In State v. Ulibarri, 668 P.2d 568 (Utah 1983), the Supreme Court of Utah, in finding that a robbery had occurred, as opposed to a theft and subsequent assault, cited to, inter alia, State v. Douglas.

The court in Royal was correct in relying upon Douglas, in that, as was recognized, petitioner Ellison's shoving aside the security guard sub judice was force involved in the taking. The Fifth District was also justified in citing to Stufflebean, supra, the decision of the Third District. In such case, the defendant had grabbed a cassette radio from beside the victim, who had been sitting outside in a park. The victim had then given chase, but when he had caught up with Stufflebean and his companion, had been threatened with a knife; the thieves had then made away with the goods. The district court found that where an offender gains possession of property of another without force but where the victim gives instant and uninterrupted pursuit or protest in an effort to thwart the taking, and the offender then assaults the victim in order to complete a taking of property and make good an escape, the offense is robbery; the court cited to the decisions of a number of other states and held that enactment of section 812.13(3) Florida Statutes (1974) in 1974 had been intended to expand the common law definition of robbery. Contrary to petitioners' assertions in their brief, in citing to Stufflebean, the Fifth District did not specifically embrace the Third District's theory of legislative amendment and intent, in that the Royal court simply observed that the use of the pistol by petitioner Royal in the vehicle outside the store had occurred concurrently with the taking, in that possession of the property was still in continuing dispute.[2]

[2] The Third District's theory of statutory evolution was expressly adopted by the Second District in Ben v. State, supra, a case with facts virtually identical to those sub judice. (cont'd on bottom of page 6)

Petitioners argue that Douglas, Stufflebean, Royal and Ben all must fall because they are premised upon faulty statutory construction. As should be obvious, however, at most the results in Stufflebean and Ben hinge upon interpretation of section 812.13(3), which provides that an act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission; Douglas was decided prior to the enactment of this subsection and Royal does not expressly discuss the statute. Respondent does agree with petitioners, though, that it is important for this court to decide whether section 812.13(3) has changed the law and to further determine the continuing vitality of such early cases as Colby v. State, 46 Fla. 112, 35 So. 157 (1903) and Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922); obviously, if the statutory definition of robbery has changed, such precedents can easily be distinguished. Respondent differs with petitioners, however, in contending that this court can approve Royal without having to find that the common law definition of robbery has been expanded by statute.

To respondent, it is primarily a matter, in the words of

---

2 (cont'd)

It is worth noting, however, that this most recent position of the Second District seemingly overrules their prior precedent of Whidden v. State, 374 So.2d 543 (Fla. 2d DCA 1979), authored by two of the same district court judges, in which such court had held that § 812.13(3) pertained only to enhancement at sentencing. In addition to the statutory argument, however, the court in Ben also observed that it seemed a bit strained to differentiate between an appropriation before, as opposed to after, an overt act of violence, in that the real question was whether violence was employed to effectuate the theft. Respondent finds this observation meritorious and commends it to this court.

Douglas, of reason and logic, in that a criminal episode such as occurred sub judice should not be "split up" to the benefit of felonious defendants. This court has held that there can be no robbery without violence and no larceny with it. Montsdoca, supra. Here, there obviously was violence, and petitioners utilized such to effectuate the larceny. To respondent's knowledge, no decision of this court has held, in the context of robbery, that a "taking" is complete once the criminal actor has mere transitory physical possession of the stolen item, especially when such possession is immediately disputed by the rightful owner. Certainly neither Colby, Montsdoca or McCloud v. State, 335 So.2d 257 (Fla. 1976), the cases relied upon by petitioners, make such pronouncement. It is one thing to hold that a pick-pocket who inobtrusively filches a wallet is guilty at most of theft. It is entirely a different matter to so evaluate the actions of those who obtain possession of property, without question, in a self-service store, and who then use force and violence to ensure that no custodian of the property will prevent their departure without payment for such goods. It is worth noting that, at one time, our standard jury instruction on robbery stated that while picking a pocket or purse snatching was not robbery if no more force was used then was necessary to physically remove the property from one who did not resist, if the victim did resist to any degree, and this resistence was overcome by physical force of the offender, the act of robbery was complete. See Adams v. State, 295 So.2d 114 (Fla. 2d DCA), cert. denied, 305 So.2d 200 (Fla. 1974); Mims v. State, 342

So.2d 116 (Fla. 3d DCA 1977); E.Y. v. State, 390 So.2d 776 (Fla. 3d DCA 1980). The holding in Royal, that a taking is not complete as long as continuing dispute over possession of the stolen goods goes on, is reasonable, logical and harmonious with prior precedent.

It is also one which could have been rendered by a court in any number of different jurisdictions. In evaluating the instant issue on certiorari, this court may wish to consider how other states throughout the country have resolved the matter of what comprises a robbery, especially those states with statutes comparable to ours. See generally, Annot., Use of Force or Intimidation in Retaining Property or in Attempting to Escape, rather than in Taking Property, as Elements of Robbery, 93 A.L.R. 3d 643. Respondent finds particularly cogent decisions of Kansas, Illinois, Nebraska, Michigan and California, inter alia. All such states apparently define robbery in accordance with the common law and as set out in our section 812.12(1) Florida Statutes (1981), i.e. a taking of property by force, violence, assault or putting in fear.[3] In all of these jurisdictions, the conduct of petitioners sub judice would indisputedly constitute robbery.

The situation in Kansas may be the most apt because, in a way, it most closely resembles that before this court; in State v. Long, 234 Kan. 580, 675 P.2d 832 (1984), the Kansas

[3] The state of the law in states which have expressly amended their statutes to include as an element of robbery the force used to prevent the owner's retaking of the property, such as Oregon and Maine, inter alia, will be considered infra.

Supreme Court had to reconcile a number of seemingly contrary prior decisions, and in the course of doing so, approved or disapproved the position of lower courts throughout the state. The facts in Long are similar to those sub judice, given the rural character of Kansas. The defendant therein had gone to a dairy farm, which sold milk to the public; the arrangement was such that it was up to the customer to deposit his own purchase money in a deposit box, in that the sale building was not always attended by the owners. On the day in question, one of the owners observed the defendant in the sale building, crouched in front of the money box, which had been pried open. When she positioned herself in the doorway so as to prevent the defendant from exiting, he shoved and pushed her aside and drove away, carrying off the proceeds.

The Kansas Court of Appeals had reversed Long's robbery conviction, finding that the force employed was not precedent or contemporaneous with the taking, in that such taking had been completed by the time the owner had blocked the doorway. The Kansas Supreme Court vacated this reversal, concluding that a thief does not obtain complete, independent and absolute possession and control of money or property adverse to the rights of the owner, when the taking is immediately resisted by the owner before the thief can remove the money or property from the premises or from the owner's presence. Long had not obtained full possession of the money, and completed the theft of the property, until after he had overcome the owner's efforts to stop him from leaving and, hence, his conviction of robbery was reinstated.

Needless to say, the Kansas example is one which respondent hopes this court will emulate, and it is literally true that courts throughout the nation have rejected hypertechnical arguments, such as those made by petitioners sub judice, regarding the required number of seconds between "taking" and "force". In doing so, such courts have considered quite literally myriad numbers of factual situations, involving the manner in which a defendant obtains stolen property. A common theme running through all such decisions seems to be a desire by the respective court to see to it that the criminal actors are punished in proportion to the acts committed and in accordance with the principle that those who commit their takings accompanied by violence, pay a higher price than those who do not.

Thus, in People v. Beebe, 70 Mich.App. 154, 245 N.W.2d 547 (1976), a robbery was found where store employees themselves had loaded four cases of beer into the trunk of the defendant's car, with the expectation of payment; at the cash register, the defendant had produced a firearm, instead of a fifty dollar bill. The court found that a single transaction had occurred, and stated that the owner had not severed all rights of possession as to the beer when such had been placed in the defendant's trunk, in that, if the defendant had not intervened with force, the store employees would have been able to recover the property. Likewise, in a more traditional setting, in State v. Bell, 194 Neb. 554, 233 N.W.2d 920 (1975), the Nebraska Supreme Court sustained the defendant's conviction of robbery, in a situation where the defendant had entered a filling station, picked up a cash register

while the attendant's back was turned, and thrown such into his vehicle. As occurred in Royal, the store owner had pursued and tried to retrieve the property from the vehicle when he had been struck and pushed by the defendant. The court asked rhetorically, "[c]an it be said that 'the taking' is no longer in process when a struggle is in progress for possession of the stolen property?", and, answering its own question, affirmed, finding that the record showed the use of force during the taking.

The decisions of two other states are likewise worth examining. Courts in Illinois have held that when the initial taking of property has been accomplished without force, the offense can still constitute a robbery if the defendant's departure is accomplished by use of force. See People v. Kennedy, 10 Ill.App.3d 519, 294 N.E.2d 788 (1973); People v. Ditto, 98 Ill.App.3d 36, 53 Ill.Dec. 590, 424 N.E.2d 3 (1981). In the latter case, the victim had returned home to find the defendant in the possession of his briefcase and about to depart with it; a fight had then ensued during which the defendant dropped the briefcase and was subdued. The defendant subsequently broke free and stabbed the victim repeatedly with a screwdriver; as he ran off, he threw tools at another pursuer. The victim discovered a great deal of property missing; the defendant's claim that all takings had been complete prior to his usage of force was rejected, given the fact, inter alia, that but for the victim's intervention, the defendant would have carried off the briefcase. California courts have shown a similar lack of sympathy to breaking a robbery into bits and pieces for the

convenience of the defense, observing that to so so would "make an unwarranted distinction for the benefit of thieves, for their escape with the loot by means of force is as important in the commission of the crime as gaining possession of the property in the first instance." People v. Reade, 17 Cal.Rptr. 328, 330 (Cal.App. 2 Dist. 1961).

In a situation similar to that sub judice, i.e. where a shoplifter exits the store with stolen goods only to be confronted with a security guard whom he then assaults, another California court emphasized the fact that robbery was a continuing offense. Thus, in People v. Estes, 194 Cal.Rptr. 909, 912 (Cal.App. 1 Dist. 1983), the reviewing court, construing a statute on par with our own, stated that the crime of robbery begins at the time of the original taking and continues on until the robber reaches a place of relative safety. Such crime is not divisible into a series of separate acts and a defendant's guilt will not be weighed at each step of the robbery as it unfolds. Given the singlemindedness of purpose expended by the defendant in Estes, the court found the force used to prevent the guard from retaking the property and to facilitate the escape sufficiently contemporaneous and sufficient in and of itself to satisfy all statutory elements. Using language similar to that of our Second District in its Ben decision, the California court regarded the force used as "in furtherance of the robbery", and noted that such force would be sufficient whether used to gain original possession of the property or to resist attacks to retake it. As noted, all of the above decision, to respondent's

knowledge were rendered by courts construing statutes embracing only the common law definition of robbery; obviously, such statutes' wording did not prevent the courts from reaching logical and sound conclusions.

While finding the above out-of-state cases the most persuasive, respondent emphasizes that the above jurisdictions are not the only ones in which the Royal holding would be welcome. Compare also Herrmann v. State, 239 Miss. 523, 123 So.2d 846 (1960); Burko v. State, 19 Md.App. 645, 313 A.2d 864 (1974); State v. Ulibarri, supra. Before moving on, however, it is instructive to, in a sense, return to the starting point, State v. Culver, supra, the first out-of-state considered and that relied upon in State v. Douglas. Such case held, of course, that when a thief has to use force to overcome the efforts of an owner seeking to prevent his departure with already stolen goods, such force is sufficiently concurrent with the taking so as to make the offense robbery. In justifying its conclusion, the court considered a number of hypothetical scenarios. In one of them, the court reasoned that, if a thief surreptitiously gained entrance to a bank vault, took possession of the money therein and escaped by assaulting the employee who opened the door of the safe the next morning, it could hardly be said that a robbery had not been perpetrated. As an alternative example, the court considered the instances in which a thief grabbed money from the till of an inattentive bank teller and then pointed a gun at the bank guard who sought to prevent his exit from the building. In respondent's respectful opinion, any court tempted to adopt

petitioners' position should first consider the two scenarios set out above; it is doubtful that even petitioners sub judice could seriously contend that only a pair of misdemeanors had been committed in each.

Borrowing shamelessly from the above precedents, respondent contends that robbery in Florida must be recognized as a continuing offense and one not readily divisible into a series of separate acts for the undeserved benefit of criminals. If fear or violence has been utilized during a transaction or a criminal episode, the question should be whether or not such force was utilized to effectuate the criminal purpose; if it clearly was so used, and the criminal purpose was theft, then the offense committed was robbery. Criminal liability should not hinge upon such vagaries of fate as the attentiveness of a security guard or the ability with which "shoppers", legitimate and otherwise, can obtain without interference transitory possession of goods in a self-service market. If the purpose of the robbery statute is to punish those who couple their takings with violence, what legitimate interest is served by holding that one who enters a store, gun drawn, and demands property is guilty of robbery, a felony, while one who enters a store quietly and leaves, gun drawn, stolen property in hand, threatening those who seek to prevent his exit, is guilty of, at most, two misdemeanors, theft and assault? No precedent in Florida demands this result nor does any construction of section 812.13. Respondent urges this court to reject it, approve the decision below, and hold that a force is utilized in any manner to effectuate

a theft, the offense committed is robbery.

In the alternative, or in conjunction therewith, respondent urges this court to consider the statutory argument raised by the Second and Third District Courts of Appeal in Ben, supra, and Stufflebean, supra, respectively; it is such courts' position that enactment of section 812.13(3) in 1974, which holds that an act will be deemed in the course of committing a robbery if it occurs in an attempt to commit such or in flight after the attempt or commission of such, expanded the common law definition of robbery. Certainly such language seems expansive in nature, and respondent knows of no reason why it should relate only to enhancement of sentence or be utterly without meaning, as apparently is petitioners' position. As the Third District recognized in Stufflebean, other jurisdictions have similarly amended their robbery statutes to include force used to prevent recovery of stolen merchandise as force properly included in a robbery. Compare also State v. Rios, 24 Or.App 393, 545 P.2d 609 (Ct.App. 1976); State v. Young, 390 A.2d 1056 (Me. 1978); People v. Santiago, 62 A.D. 2d 572, 405 N.Y.S.2d 752 (App.Div. 1978); State v. Harris, 622 S.W.2d 742 (Mo.App. 1981); Lightner v. State, 535 S.W.2d 176 (Tex.Crim.App. 1976).

Indeed, paradoxically, even New Jersey, which decided the excellent State v. Culver, supra, based upon logic and reason, would now probably rely upon its new robbery statute in evaluating the sufficiency of evidence as to robbery. In State v. Mirault, 457 A.2d 455 (N.J. 1983), the New Jersey Supreme Court construed such new statute for the first time and, in doing so, noted the

number of states throughout the country which had recently amended their statutes in this area, with the intent of protecting the public not only from thieves, but from thieves prepared to do violence. It would seem that the trend is against accepting arguments such as those raised by petitioners, in that their conduct is exactly the type which should be fully sanctioned by the criminal law. Petitioners have not convincingly demonstrated that the Second and Third District Courts of Appeal are totally in error in attributing this sentiment to our legislature and respondent urges this court to adopt their position, while recognizing that such is not necessary to approval of the decision of Royal v. State.

In sum, the two "roads" suggested by respondent sub judice, i.e. statutory construction and "reason and logic", lead to the same result - rejection of petitioners' contention that one must determine criminal liability solely on the basis of artificial sequence of events. One who uses force or violence to commit a larceny should, under all circumstances, be guilty of robbery. The fact that a robber uses force to effectuate his exit with the stolen goods or to beat back the immediate resistence of the property's rightful owner is good evidence that the same robber would have used that force, if necessary, earlier on in the proceeding. As long as force or violence is used for a single purpose relating to a theft, then it makes no sense whatsoever to split the criminal episode into divergent elements.

If petitioners sub judice had stolen the merchandise in question on Tuesday and then returned to the store on Friday and, out of spite, "pushed a round" the security guard, they would indeed be guilty of a theft and an assault. Because, however, in one continuous transaction, they entered the store, collected the merchandise, pushed aside the security guard, who blocked their path at the doorway, and then used force and violence upon other store employees who sought to prevent their departure from the store's parking lot by car, all events within minutes or seconds of each other, they committed robbery. The decision below should be affirmed.

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent urges this honorable court to affirm and approve the decision below.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been ~~furnished by~~ mail to Larry B. Henderson, Assistant Public Defender, 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014, this 20 day of February, 1985.

Of Counsel
Richard B. Martell