IN THE SUPREME COURT OF FLORIDA

LINDA GAYLE ROYAL and WILLIAM ELLISON,	)
Petitioners,	)
vs.	)
STATE OF FLORIDA,	)
Respondent.	)

CASE NO. 65120

PETITIONERS' BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PETITIONERS' BRIEF ON JURISDICTION

STATEMENT OF THE CASE

Linda Gayle Royal (hereafter Royal) and William Ellison (hereafter Ellison) were tried together in the Circuit Court in and for Seminole County, Florida, the Honorable Robert M. McGregor presiding (TR1-176)[1/], and convicted of Robbery With a Firearm (TR173-174). Timely appeals were taken to the Fifth District Court of Appeal, which appeals were consolidated to enable use of a single trial transcript. Each appeal presented substantially the same question of law.

Oral arguments were had in the case on October 3, 1983, and

1/ (TR) refers to the transcript of the trial contained in the Record on Appeal of Fifth District Court of Appeal Case No. 82-1050.

on July 19, 1984 the Fifth District Court of Appeal, ruling En Banc, affirmed both convictions (A6)[2/].

No Rehearing of the above decision was filed, and accordingly the decision became final on August 2, 1984. A Notice of Intent To Seek Discretionary Review was thereafter filed by Petitioners on August 7, 1984 (A7). This brief follows.

[2/] (A) refers to the Appendix filed with this brief.

STATEMENT OF THE FACTS

The facts concerning the alleged robbery by Royal and Ellison are set forth in the instant opinion as follows: "Royal and Ellison were observed in a department store placing clothing in a plastic garbage bag. As Appellants proceeded past the cash register and toward the front door a store detective, Ricciardone [sic], attempted to deter them and was pushed aside by Ellison. Appellants left the store and were getting into an automobile outside when the store detective and two other store employees, Morris and Cox, attempted to recover the clothing and detain Appellants. As Morris attempted to grab the ignition key Ellison hit Morris. As Cox was pulling at Ellison in the automobile, Royal produced a pistol and pointed it at Cox's forehead. The three store employees retreated. The ignition key having become bent and useless Appellants fled on foot and were apprehended. The pistol was found in the automobile but there was no evidence that it had been carried into the store." (A6).

At the conclusion of the State's case, defense counsel, representing both Ellison and Royal, moved for Judgment of Acquittal, arguing that the taking had been completed prior to the use of any force, which acts would constitute a larceny rather than a robbery. (TR94-100). The judge denied the motion as to each defendant, ruling as a matter of law that the language in Section 812.13, Fla. Stat. (1981) [in the flight after the commission][3] elevated a completed theft to that of robbery (TR99-100).

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[3] Section 812.13(3), Fla. Stat. (1981), reads "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 of commission." (Emphasis added).

In affirming the trial court's ruling, the Fifth District Court of Appeal, over a strong dissent by Judge Cowart, held as follows:

> Accordingly, we hold that the pushing aside of the store detective by Ellison was, as in Douglas[4], force involved in the taking of the property and that the use of the pistol in the automobile occurred concurrent with the taking because possession of the property was still in continuing dispute, as in Stufflebean[5].

Royal v. State, ___ So.2d ___ (Fla. 5th DCA July 19, 1984)(En Banc) [9 FLW 1561](A6).

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[4] State v. Douglas, 337 So.2d 407 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 946 (Fla. 1977).

[5] Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983).

POINT

THERE IS EXPRESS AND DIRECT CONFLICT BETWEEN ROYAL V. STATE, ___ So.2d ___ (Fla. 5th DCA July 19, 1984)(EN BANC)[9 FLW 1561], AND THE CASES OF COLBY V. STATE, 46 Fla. 112, 35 So. 189 (1903), AND MONTSDOCA V. STATE, 84 Fla. 82, 93 So. 157 (1922), IN THAT ROYAL HOLDS THAT A COMPLETED THEFT MAY BECOME A ROBBERY UPON APPLICATION OF FORCE AFTER THE TAKING, WHEREAS THE SUPREME COURT CASES REQUIRE THAT THE FORCE USED IN THE TAKING PRECEDE OR BE CONTEMPORANEOUS WITH THE TAKING.

In Colby v. State, 46 Fla. 112, 35 So. 189 (1903), a pickpocket was apprehended when the wouldbe victim felt the pickpocket's hand in his pocket and grasped the thief, holding him until the police arrived. In reversing the robbery conviction, this Court stated as follows:

> ... The evidence does not disclose such force, violence, assault, or putting in fear as is contemplated by the statute, but merely an attempt to furtively abstract [sic] from the pocket of Bousman money or other valuables supposed to be contained therein. This might constitute an attempt to commit larceny, but not robbery. Where one stealthily filches loose property from the pocket of another, and no more force is used as such as may be necessary to remove the property from the pocket, it is not robbery under the statute, but larceny. (Citations omitted)....
>
> From the evidence it appears that after Bousman became aware that defendant's hand was in his pocket, he caught the defendant by the arms, calling upon Davidson and a policeman for assistance, and that a struggle ensued, in which the

> parties clinched. If the defendant struggled or clinched with Bousman in an effort to overpower him for the purpose of enabling him to secure the money from the pocket, there would be such force as the statute contemplates, but the force used merely in an effort to escape from the grasp of Bousman or to avoid arrest would not be such force as contemplated by the statute.

Colby, supra, at 190 (Emphasis added).

The material facts in the instant case are virtually indistinguishable from those set forth in Colby. The defendants, while in a department store, stealthily took articles of clothing and placed them in a plastic garbage bag. They proceeded past the cash registers to the front door where a store detective was pushed aside when she attempted to "deter" them. The defendants then fled outside and got into a car but were apprehended after a physical fight, which fight included the display of a firearm. The Fifth District Court of Appeal held that the pushing aside of the store detective by Ellison was force "involved in the taking" of the property, ergo force sufficient to constitute robbery. The Fifth District Court of Appeal expressly adopted the holding of State v. Douglas, 337 So.2d 407 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 946 (Fla. 1977), that, "where an offender gains possession of property of another without force and with intent to deprive the true owner of its use, but the victim gives instant and uninterrupted protest or pursuit in an effort to thwart taking, and the offender then assaults the victim in order to complete a taking of the property and make good an escape, the offense is robbery." (Emphasis added).

Not only does this holding expressly and directly conflict with Colby, supra, but also that of Montsdoca v. State, 84 Fla. 82,

93 So. 157 (1922). In Montsdoca, this Court stated, "... the distinction between larceny and robbery is a nice one. The criterion which distinguishes these offenses is the violence which precedes the taking. There can be no robbery without violence, and there can be no larceny with it. It is violence that makes robbery an offense or greater atrocity than larceny. Robbery may thus be said to be a compound larceny composed of the crime of larceny from the person with aggravation of force, actual or constructive, used in the taking. (Citation omitted)." (Emphasis added). Id. at 159.

It is clear that express and direct conflict exists between Royal, supra, Colby, supra, and Montsdoca, supra. This Court should exercise that discretion and review the instant case not only because the case is wrong, but because a disturbing trend in the law is now emerging. Cf., Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983)(J. Baskin, dissenting), Andre v. State, 431 So.2d 1042 (Fla. 5th DCA 1983). The nice distinction between larceny and robbery is becoming blurred by disregard of established principles of law. Petitioner can only draw this Honorable Court's attention to the excellent dissenting opinions of Judge Cowart in Royal, supra, and Judge Baskin in Stufflebean, supra.

CONCLUSION

In that express and direct conflict exists between Royal, supra, Colby, supra, and Montsdoca, supra, this Court is respectfully requested to exercise its discretionary jurisdiction to review this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: The Honroable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014; Ms. Linda Gayle Royal, Inmate No. 150993, Broward Correctional Institution, P. O. Box 8540, Pembroke Pines, FL 33024; and Mr. William Ellison, Inmate No. 085179, Polk Correctional Institution, 3876 Evans Road, Box 50, Polk City, FL 33868 this 14th day of August, 1984.

Larry B. Henderson
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