OA 4-12-85

IN THE SUPREME COURT OF FLORIDA

LINDA GAYLE ROYAL and WILLIAM ELLISON, Petitioners,	)	CASE NO. 65,720
vs.	)	
STATE OF FLORIDA, Respondent.	)	

PETITIONERS' BRIEF ON THE MERITS

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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 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

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.

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

the decision became final on August 2, 1984. A Notice to Seek Discretionary Review was filed by Petitioners on August 7, 1984, and review was granted by this Court on January 15, 1985. This brief follows.

STATEMENT OF THE FACTS

The facts concerning the alleged robbery by Royal and Ellison are set forth in the opinion of the Fifth District Court of Appeal as follows: "Royal and Ellison were observed in a department store placing clothing in a plastic garbage bag. As [Petitioners] 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. [Petitioners] 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 Petitioners. 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 [Petitioners] 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." Royal v. State, 452 So.2d 1098, 1099 (Fla. 5th DCA 1984)(En Banc).

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. (TR 94-100). 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 (TR 99-100).

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, 452 So.2d 1098, 1100 (Fla. 5th DCA 1984)(En Banc).

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).

SUMMARY OF ARGUMENT

Reversal of the robbery convictions in the instant case is required because the force/threat occurred after the taking of property was accomplished. Florida's robbery statute does not redefine the crime of robbery to include force that occurs after a taking or consumated theft, and the Appellate Courts have been wrong to so conclude. This is so generally because the term "force used in the course of committing the robbery" modifies the robbery statute, not the theft statute. Thus §812.13(3), Fla.Stat. must implicitly read as follows: "An act shall be deemed 'in the course of committing the robbery' if it occurs in an attempt to commit the robbery or in flight after the attempt or commission" [of the robbery].

ARGUMENT

POINT I

THE LOWER COURTS ERRED IN RULING THAT THE OFFENSE OF THEFT, THOUGH COMPLETED, BECOMES THE OFFENSE OF ROBERY PURSUANT TO §812.13(3) WHEN FORCE OR VIOLENCE OCCURS IN THE FLIGHT FROM SAID THEFT, AS OPPOSED TO FLIGHT FROM A ROBBERY.

A "robbery" is "the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear," §812.13(1), Florida Statutes (1981), whereas a "theft" occurs where a person "knowingly obtains or uses, or endeavors to obtain or use, the property of another with the intent to deprive the other person of a right to the property or a benefit therefrom." §812.014, Florida Statutes (1981). Thus, the distinction between the two offenses is the presence vel non of force used in the actual taking of the property or money.

> [T]he 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 of greater atrocity then larceny. Robbery may thus be said to be a compound larceny composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. (citation omitted).
>
> An intent to steal is essential, so is violence or putting in fear. (citation omitted). The violence or intimidation must precede or be contemporaneous with the taking of the property.

Montsdoca v. State, 84 Fla. 82,93 So. 157,159 (1922) (emphasis added).

Traditionally, where force occurs in an effort to escape apprehension after a theft has occurred or been attempted, the force constitutes a separate crime and the force cannot be used to make the theft a robbery. Colby v. State, 46 Fla. 122, 35 So.189 (1903).

Recently, however, the Florida appellate courts have been erroneously interpreting §812.13[6/] to create a robbery out of a theft and a subsequent assault as battery. This trend began innocently enough with the case of Andre v. State, 431 So.2d 1042 (Fla. 5th DCA 1983) where the Fifth District Court of Appeal affirmed a robbery conviction. The decision reflects that the defendant had "snatched money from the hand of the victim while in the process of discussing a drug deal." Id at 1042, (emphasis added). The court correctly held that the act of "snatching" the money was force sufficient to constitute robbery pursuant to McCloud v. State, 335 So.2d 257 (Fla. 1976), but the court went on to state the following:

6/ §812.13 Fla.Stat. (1981), in pertinent part, provides:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment...
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree...
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree...
> (3) 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.

> The second reason appellant is wrong when he asserts the jury could not find him guilty of robbery is because the statutory definition of robbery includes not only the act of forcibly taking, but it also includes the use of force "in flight after... the commission."

Andre, supra, at 1043 (emphasis added).

Petitioner respectfully submits that the court's "second reason" was but incorrect dicta. The reasoning was not necessary to correctly resolve the appeal. It is incorrect because the term "in the course of committing" is NOT used to define the crime of robbery [§812.13(1) Fla.Stat.], but instead used to establish the correct punishment for the amount of force used in the course of committing the robbery [not in the course of committing a theft].

In Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983) the Third District Court of Appeal adopted the falty dicta from Andre over a strong dissent by Judge Baskin. Judge Baskin argued in part the following:

> The majority's interpretation of section 812.113(3) is misguided. The definition of robbery has not been changed by the legislature. An examination of the title of a bill offers guidance in the determination of legislative intent. Parker v. State, 406 So.2d 1089 (Fla. 1981). The title of the robbery statute, Chapter 74-383, Laws of Florida describes the law as "An Act relating to the criminal law...defining the crimes of and providing the penalties for robbery...." The common law definition of robbery, set forth in subsection (1) of section 812.13, has remained unchanged since the days of Blackstone. Subsection (2) provides the penalties for robbery. The title of the act establishes that these provisions are separate. Only subsections 2 and 3 contain the phrase "in the course of committing

> the robbery." Subsection 3 is clearly directed to the sentencing portion of the statute and not to the subsection which defines the crime of robbery; thus subsection 3 is not part of the definition. I therefore disagree with the majority that force used in an effort to flee from a larceny converts a larceny followed by an assault into robbery.

Stufflebean, supra at 247 (Baskin, J, dissenting).

In Royal v. State, 452 So.2d 1098 (Fla. 5th DCA 1984)(En Banc), the Fifth District Court of Appeal expressly interpreted the "in the course of committing" phrase to allow the creation of a "robbery" if force is used in the flight after commission of a theft. After a thorough analysis of the distinction between theft and robbery, Judge Cowart in a dissenting opinion concluded as follows:

> In short, I agree with Judge Natalie Baskin in the dissent in Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983), that the force or fear required for robbery must be the means by which the taking of property is accomplished and that element of robbery is not established by "force or fear" occurring after a non-violent taking. Robbery was intended only to protect an owner from being intimidated by force or fear in having his property wrongfully taken from him or from his immediate presence and from the use or threat of violence to accomplish such a taking and was not intended for the purpose of enhancing the punishment for a non-violent taking (a completed larceny) when violence occurs only as the result of a courageous owner endeavoring to recover his property or apprehend the thief. The usual penalty for unlawful assaults and batteries occurring in these instances is sufficient without introducing the notion that a taking of property is not complete as long as its possession is in "continuing dispute" and distorting the established law relating to

> the distinctions between the offenses of theft and robbery.

Royal, supra at 1104 (Cowart, J., dissenting).

Finally, and most recently, in Ben v. State, 10 FLW 123 (Fla. 2d DCA January 4, 1985), the second District Court of Appeal adopted the erroneous reasoning of Andre, Stufflebean and Royal. That court stated, "[w]e add that it seems to us a bit strained to differentiate between an appropriation before, as opposed to after, the overt act of violence. The real question is whether violence was employed to effectuate the theft." Ben, supra at 124. It is apparent that the focus of the appellate courts' is becoming blurred if it no longer matters when the use of force must occur in order to have a robbery, as opposed to having two separate and distinct crimes [ie, a theft and an aggravated assault].

The crime of robbery is statutorily defined in §812.13(1), Fla.Stat. This definition comports with the common law definition of robbery. There is absolutely no indicia of legislative intent that a "robbery" occurs where force is applied subsequent to a taking. Accordingly, this court should reverse the instant robbery convictions and remand the case with directions, 1) to impose convictions and sentences for petit theft, and 2) to order the immediate discharge of Petitioners .

CONCLUSION

Based upon the argument and authority contained herein, this Court is respectfully asked to reverse Petitioners' robbery convictions and to remand the matter with directions that, 1) Petitioners be adjudicated guilty of and resentenced for petit theft, and 2) the immediate discharge of Petitioners be ordered.

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 Honorable Jim Smith, Attorney General at 125 N. Ridgewood Avenue, Fourth floor, Daytona Beach, Florida 32014, and to Ms. Linda Gayle Royal, Inmate no. 150993, Broward Correctional Institute, P.O. Box 8540, Pembroke Pines, Florida 33024, and to Mr. William Ellison, Inmate no. 085179, Polk Correctional Institute, Box 50, 3876 Evans Rd., Polk City, Florida 33868 on this 29th day of January, 1985.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER