OA 4-12-85 OAS req 2

IN THE SUPREME COURT OF FLORIDA

LINDA GAYLE ROYAL and WILLIAM ELLISON,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,720

PETITIONERS' REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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

Urging this Court to recede from its prior holdings in McCloud v. State, 335 So.2d 257 (Fla. 1976), Montsdoca v. State, 84 Fla. 82, 93 So.157 (1922) and Colby v. State, 46 Fla. 112, 35 So.189 (1903) in order to "[align] itself with the positions already taken by the district courts of appeal of this state" (AB at p.2)[1/], the state points to various decisions from outside of Florida. In doing so, the state is ignoring that the issue sub judice is one of statutory construction. Thus, unless the other states have statutes identical to Florida's statute, the foreign decisions are inapposite. The state contends that "a robbery is a continuous, indivisable [sic] criminal episode " (AB at 2), and argues persuasively that "[o]ne who uses force or violence to commit a larceny should, under all circumstances, be guilty of robbery." (AB at 16, emphasis added). The argument, however, totally overlooks the provisions of the controlling statute. It is not for the attorney general to summarily pronounce the law of Florida and the law in Florida is simply not as it is declared to be by Respondent.

1/ (AB) refers to the Answer Brief of Respondent.

In Florida, 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) Fla.Stat. (1983). This statutory definition comports with the common law definition of robbery for, as noted in Bell v. State, 394 So.2d 979 (Fla. 1981) "[t]he common law elements of the crime of robbery are a taking, the use of actual or constructive force, the absence of consent on the part of the victim, and the intent to deprive the owner of the property. (citations omitted)" Id at 979.

The key question then, is what constitutes a taking? The state argues here and the Fifth District Court of Appeal in Royal v. State, 452 So.2d 1098 (Fla. 5th DCA 1984) is holding that a "taking" is incomplete as long as "possession of the property was...in continuing dispute." Id at 1100. With myopic regard to the instant case the language benefits the state. The practical effect of that language/holding, however, is that THE CRIME OF ROBBERY IS NOT CONSUMATED UNTIL THERE IS NO DISPUTE AS TO POSSESSION OF THE PROPERTY. If a store employee or home owner has been robbed[2/] and immediately pursues the robber five miles and finally apprehends the culprit, the most that the defendant could be convicted of under the rationale of the Fifth District Court of Appeal is attempted

2/ "Robbed" in the classic sense, where a robber points a firearm at another and states "your money or your life."

robbery because possession of the property was "in continuing dispute." What about 10 miles? 100 miles? 5 minutes later? 30 minutes later?

The reasoning in Royal is inapplicable and faulty. It is contrary to the common law, where "'the slightest removal of the thing stolen from its original position', or '...by the slightest removal of the thing from the place where the owner placed it, or wanted it to be, and though the transfer of possession existed for a very brief period of time, is sufficient to sustain or establish the requirements of asportation.'" Lyons v. State, 47 So.2d 541 (Fla. 1950); see also Driggers v. State, 96 Fla. 232, 118 So.20 (1920); Fitch v. State, 135 Fla. 361, 185 So. 435 (1938).

The state concludes "[T]he fact that a robber uses force to effectuate his exit with the stolen goods ...is good evidence that the same robber would have used that force, if necessary, earlier on in the proceeding. As long as force is used for a single purpose relating to a theft, then it makes no sense whatsoever to split the criminal episode into divergent elements." (AB at 16). In reply, Petitioners respectfully submit that it makes sense to continue viewing a "taking" as occurring upon asportation...any asportation...because without this finite reference point there will soon be some fascinating arguments contending that only an attempted robbery occurred because possession of the property was in continuing dispute. see Johnson v. State, 432 So.2d 758 (Fla. 1st DCA 1983).

CONCLUSION

Based upon the argument and authority contained herein and in the Initial Brief of Petitioners, this Court is respectfully asked to reverse Petitioners' convictions for robbery and to remand the matter with directions to adjudicate Petitioners guilty of petit theft and to order the immediate discharge of Petitioners.

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 Mr. William Ellison, Polk Correctional Institution, Box 50, Polk City, Florida 33868, and to Ms. Linda Gayle Royal, Broward Correctional Institution P.O. Box 8540, Pembroke Pines, Florida 33024 on this 11th day of March 1985.

LARRY B. HENDERSON
ASSISTANT PUBLIC DEFENDER