IN THE SUPREME COURT OF FLORIDA

BRUCE ALLEN GRAHAM,)
Petitioner,)
vs.) CASE NO. 65,777
STATE OF FLORIDA,)
Respondent.)
)

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

OTHER AUTHORITIES

ISSUE

IN A CRIMINAL CASE IN WHICH A DEFENDANT IS CHARGED WITH ATTEMPTED BURGLARY, AND THERE IS PROOF AT TRIAL OF THE DEFENDANT'S UNLAWFUL ENTRY INTO THE STRUCTURE OR RESIDENCE, IT IS PROPER FOR THE TRIAL COURT TO RELY ON THE STATUTORY PRESUMPTION SET FORTH IN § 810.07 IN INSTRUCTING THE JURY ON PROOF OF INTENT TO COMMIT AN OFFENSE.

ARGUMENT

In this case, Petitioner asks this Court to revisit its decision in State v. Waters, 436 So.2d 66 (Fla. 1983), regarding the applicability of the presumption of intent from stealthful entry in a trial for attempted burglary. Petitioner contends Waters resolved this question by "holding that it was improper to rely on the statutory presumption of Section 810.07 where the charge is attempted burglary" (PB 6).[1] The Respondent contends that Petitioner's interpretation needs an exception which allows use of § 810.07 in a trial for attempted burglary when there is evidence of a breaking and entering.

> In this case, however, Section 810.07 is inapplicable on its face because here the charge was attempted burglary rather than burglary, and because here there was no proof of entering, but only of an attempt to break and enter.

(emphasis added) 436 So.2d 66, at 70.

The issue of this appeal is whether this Court intended

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[1](PB) refers to Petitioner's Brief on the Merits; (R) refers to the record on appeal.

the above-quoted sentence to mena that the presumption of § 810.07 is never applicable in a trial for attempted burglary or is inapplicable only in those cases of attempted burglary where there is no proof of breaking or entering.

In this case, the State informed against the defendant for the charges of possession of a burglary tool, a knife, and attempted burglary by stealthfully entering a residence without the owner's consent, with the intent to commit the offense of theft (R 91). The eyewitness testimony of Irvin Mark Hayes established that Graham cut the screen door with a knife, placed his hand inside the screen and was in the process of unlocking the door from the inside when his presence was detected by an occupant of the house (R 12, 14).

Recent decisions by this Court concluded that, in a prosecution for burglary, the State need not specify the offense that the burglar intended to commit once inside but must state that some unspecified offense was intended. State v. Waters, supra; State v. Rozier, 436 So.2d 73 (Fla. 1983); State v. Speights, 437 So.2d 1387 (Fla. 1983). Likewise, in a prosecution for attempted burglary, the State may, but need not, specify the intended offense. Ellis v. State, 442 So.2d 213 (Fla. 1983).

The next question becomes, if the State chooses to specify the intended offense, may it rely upon the statutory presumption of § 810.07? Currently there is a conflict of authority on this issue regarding burglary trials.[2] The Second

[2]Conflict certified and presently awaiting decision in Frederick v. State, Case No. 65,534.

District stands apart from the Third and Fifth Districts. In Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983), the court interpreted Waters as meaning that if the State elects to specify the offense intended then it is precluded from relying on the presumption.[3] However, the contrary conclusion was reached in L. S. v. State, 446 So.2d 1148 (Fla. 3d DCA 1984), and Frederick v. State, 451 So.2d 1066 (Fla. 5th DCA 1984).

The State respectfully submits that the decisions of the Third and Fifth Districts are more reasonable. If the State is not required to allege the specific offense intended, but if it so elects, then it is precluded from relying on the presumption, there is no incentive to ever enumerate the particular offense. L. S. v. State, supra. Furthermore, if specification of the intended offense is not an essential element of the crime, then it is unfair to demand that the State prove that which is necessarily only surplusage. State v. Clark, 442 So.2d 209 (Fla. 1983).

The Bennett construction is not mandated by this Court's decision in Waters. The certified question, as modified, was answered by this Court, stating:

> Thus Section 810.07 provides the state with an alternative method of proving a charge of burglary when it is unable to adduce any evidence of the defendant's criminal intent when unlawfully entering a structure or conveyance.

(emphasis added) 436 So.2d 66, at 70.

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[3]Reasoning ratified and followed in T. L. S. v. State, 449 So.2d 1008 (Fla. 2d DCA 1984).

The court did not limit the use of § 810.07 to those cases where the specific offense was enumerated. It follows that the State is permitted to use the presumption whether it realizes that it is unable to adduce evidence of criminal intent when initially charging the offense or later at trial. Waters involved an information where the offense of theft was specified, so had this Court intended to preclude use of the presumption in those instances, it could have easily done so.

Petitioner contends that § 810.07 is inapplicable on its face in a trial for attempted burglary because it states:

> In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthfully and without consent of the owner or occupant thereof shall be prima facie evidence of entering with the intent to commit an offense.

(emphasis added) § 810.07, Fla. Stat. (1983).

The State recognizes that penal statutes are to be strictly construed. However, by requiring some evidence of entering before allowing use of the presumption in attempted burglary trials, the statute is not extended.

Nearly every case in which there is an illegal entry is a burglary, rather than an attempt. The burglary is complete upon the entering with the requisite intent. However, when there is an entering but for some reason the crime remains inchoate, the State should be able to rely on the presumption when that entering is stealthful. One possible situation is when the burglar enters a store during business hours, then conceals himself until after closing hours. The entry is with

consent until the store closes.

There are many crimes that fall under the umbrella of burglary. Section 810.02, Fla. Stat. (1983), defines burglary, and then enhances punishment according to factual variables, including whether the structure is occupied, whether the offender carried a gun or dangerous weapon, or assaulted or battered someone. In practice, these factual variables must be pled and proven; therefore, they have become substantive crimes. Burglary without a dangerous weapon is a lesser offense than if the offender is armed. Attempted burglary is also a lesser included offense. Brown v. State, 206 So.2d 377 (Fla. 1968); Florida Standard Jury Instructions in Criminal Cases, p. 264. An attempted burglary is a burglary. The legislature recognized the problem the State has in proving specific intent and, to ameloriate the situation, has provided the statutory presumption. Therefore, it logically follows that the legislature intended the State to rely upon the presumption in trials for attempted burglary.

Although this case reaches this Court on the certified question alone, Petitioner seeks to again contest the sufficiency of the evidence to support the crime of attempted burglary with the intent to commit a theft within the residence.

Even apart from the presumption arising from stealthful entry, there was sufficient evidence to support the verdict and conviction. The element of intent can often only be proved by circumstantial evidence. As this Court noted in Waters, there are numerous cases where the specific intent to steal was proven

circumstantially, including the presence of property or goods to be stolen. 436 So.2d 66, at 71-72. In the instant case, the owner testified that the house contained a television, a radio, guns and jewelry (R 26). The State contends that this evidence provided a sufficient basis to conclude that the intended crime was theft.

Petitioner argues further that because he carried a knife, the circumstances of the case are consistent with the intent to commit a crime against the person. This contention is contradicted by the evidence adduced at trial. Once the presence of the defendant was detected by one of the occupants, he immediately fled.(R 12). When he was told to drop the knife, he immediately complied (R 13). The only reasonable hypothesis regarding the knife is that it was intended to be used only to gain entry. The question of whether the defendant had the intent to commit theft is one to be decided by the trier-of-fact based on all of the circumstances. Dobry v. State, 211 So.2d 603 (Fla. 3d DCA 1968). By their verdict of guilty, the jury necessarily rejected all other reasonable hypotheses.

The State respectfully requests this Honorable Court to affirm the decision of the Fifth District Court of Appeal in all respects and answer the certified question in the positive.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished, by delivery, to Christopher S. Quarles, Assistant Public Defender for Petitioner (1012 S. Ridgewood Ave., Daytona Beach, FL 32014-6183), this 27th day of September, 1984.

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