IN THE SUPREME COURT OF FLORIDA

BRUCE ALLEN GRAHAM,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

Case No. 65,777

PETITION FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

On March 24, 1983, the state filed a two count information charging Petitioner with burglary and possession of burglary tools. (R 92) On April 21, 1983, the state filed an amended information charging the appellant with possession of burglary tools and attempted burglary. (R 91) The case proceeded to a jury trial on May 6, 1983. (R 1)

At the close of the state's case-in-chief, Petitioner moved for a judgment of acquittal which was denied. Petitioner presented no evidence in his own behalf, renewed his previously made motion for judgment of acquittal and was denied again. (R 36-37)

Petitioner requested a jury instruction on circumstantial evidence which the trial court refused. (R 49) The trial court gave the jury instruction on the statutory presumption regarding stealthful entry being prima facie evidence of entering

with the intent to commit an offense. This instruction was given over Petitioner's objection. (R 49-53)

Following deliberation, the jury returned with verdicts of guilty as charged on both counts. (R 77) Petitioner's motion for new trial was denied. (R 80-84) The trial court adjudicated the petitioner guilty on both counts and sentenced him to five (5) years imprisonment on each count to run concurrent with one another. Petitioner was allowed ninety-one (91) days credit for time previously served. The sentences were ordered to run consecutively with any active sentence. (R 95-101)

On August 2, 1984, the Fifth District Court of Appeal rendered its opinion in this cause. (See Attached Appendix). In that opinion, the Court determined that an instruction allowing the jury to find proof of the intent to commit theft based on the statutory presumption set forth in Section 810.07, Florida Statutes (1983), was proper where there was proof at trial of an unlawful entry. The Court reached this conclusion despite the fact that Petitioner was charged with attempted burglary rather than the offense of burglary. The Court also determined that the unlawful entry into the residence was minimal. (At trial it was established that the petitioner cut a door screen and thrust his hand through the opening in an effort to unlock the door.) In holding that the instruction in this case was proper and in affirming Petitioner's conviction, the Fifth District Court of Appeal, in accordance with Art. V, §4, Fla.Const. and Florida Rule of Appellate Procedure 9.030(a) and (2)(v), certified the

following question as one of great public importance to the Florida Supreme Court for resolution:

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

Graham v. State, ___ So.2d ___, 9 FLW 1674 (Fla. 5th DCA Case No. 83-928, 8/2/84).

Petitioner filed a notice to invoke discretionary jurisdiction on August 20, 1984. This Honorable Court issued the briefing schedule in the above-styled cause on August 22, 1984.

STATEMENT OF THE FACTS

On March 19, 1983, at approximately 10:15 p.m., Irvin Hayes was sleeping in his bedroom located near the back door of his house in Melbourne, Florida, Brevard County. (R 9-10) The house was owned by Irvin's father, Holly Albert Hayes. (R 10) Holly Hayes was watching television at the time in the center of the house. (R 21-22) The house was fairly dark at the time with most of the lights out. (R 22-23)

Irvin was awakened by the noise of a screen and wood cracking. (R 12) He rolled over in bed and looked out the back door when he spotted the petitioner at his back door. Irvin watched as the petitioner put has hand inside the screen while attempting to unlock the door handle. (R 14) Irvin sat up, at which point the petitioner saw him. The petitioner then began to run from the scene. Irvin got out of bed, went out the back door and chased the petitioner across the street into the next door neighbor's yard. He was able to keep the petitioner in sight during the chase. (R 11-12)

Irvin eventually caught up with the petitioner who turned around to face Irvin. Petitioner was walking backwards with an open knife in his hand. Irvin testified that this knife was used to cut the screen. (R 13) Irvin advised the petitioner to drop the knife which he did. The petitioner told Irvin that if he let him go he would get on his bicycle and would not be seen again. (R 16) Irvin picked the knife up and marched the petitioner back across the street to the front of his house. He made the petitioner lie down on his stomach. (R 13) Irvin then

called his father to the front door and had him call the police. Father and son stood guard while waiting for the police to arrive. (R 13)

While waiting for the police, Mr. Hayes asked the petitioner his name to which the petitioner replied, Bruce Graham. (R 24) The petitioner told Mr. Hayes that he lived in Sherwood Park approximately four (4) miles away. (R 24) The petitioner appeared to be upset and stated that his wife had left him. (R 28) Mr. Hayes asked the petitioner why he did it, to which the petitioner replied that he was just messing around. (R 28)

Mr. Hayes had four (4) guns, a television, a radio, some jewelry, and the usual things of value in his house. (R 26)

Officer Duncan of the Melbourne police, arrived and arrested the petitioner. On the way to the station, the petitioner volunteered the statement that he was sorry that he broke into the house and that he did not know why he had done so. He asked if Officer Duncan would talk to the victims. He offered restitution for the damage to the screen if they agreed to drop the charges. (R 29-34)

ISSUE

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

Section 810.07, Florida Statutes (1983) provides:

> 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 intent to commit an offense. (Emphasis supplied).

At the charge conference in the instant case, Petitioner stated his timely and specific objection to this instruction based upon the contention that the instruction was limited to a trial on the charge of burglary. Here, Petitioner was charged with attempted burglary. (R 49-50) The trial court overruled the objection and instructed the jury according to the statute. (R 52-53, 66)

As the district court recognized, this Court answered a similar question in State v. Waters, 436 So.2d 66 (Fla. 1983), holding that it was improper to rely on the statutory presumption of Section 810.07 where the charge is attempted burglary. This Court concluded that the statutory presumption on its face does not apply to attempt. Id. at 70. (Emphasis supplied). However, the district court grasped at one phrase in that opinion as an indication that the statutory presumption may be used where there is proof of an entry.

> 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.

Id. at 70. Based on this language, the district court held that the instruction in the instant case was proper in light of the extremely minimal evidence of entry. (Petitioner's hand barely made it inside the screen of the back door).

Petitioner contends that the district court was clearly in error in their attempt to justify their affirmance based upon this surplus language from this Court's opinion in State v. Waters, supra. The phrase "in applicable on its face" leads one to the logical conclusion that the statutory presumption applies as the statute plainly states, "In a trial on the charge of burglary, ...". In specifically declining to expand the scope of Section 810.07 beyond the clearly expressed legislative intent, this Court correctly pointed out that, "It is elementary that penal statutes are to be strictly construed."

Comparing the statutory presumption set forth in Section 810.07 with other statutory presumptions, one spots an important distinction. The presumption set forth in Sections 812.016 and 812.022, Florida Statutes, recite general statements of law. The following is an example of this type of presumption:

> Proof of possession of property recently stolen, unless satisfactorily explained, gives rise to an inference that the person in possession of the property knew or should have known that the property had been stolen. §812.022(2), Fla.Stat. (1983).

This is clearly distinguishable from the presumption set forth in Section 810.07 which contains the precatory language; "In a trial on the charge of burglary". Petitioner submits that this language is clearly limiting in nature and obviously reflects the legislative intent. Hence, it is clear that the statutory presumption set forth in Section 810.07 is strictly limited to trials on the charge of burglary. This Honorable Court declined to expand the scope of the section beyond the clearly expressed legislative intent in light of the rule of strict construction regarding penal statutes.

Although not addressed by the district court in its opinion, Petitioner asserted below and urges this Court to consider the insufficiency of the evidence to support the crime charged. Petitioner was charged with the offense of attempted burglary with the intent to commit theft within a dwelling. (R 91) At the conclusion of the state's case-in-chief, Petitioner moved for a judgment of acquittal based upon the specific contention that the state's evidence had failed to prove that the petitioner was attempting to enter with the intent to commit a theft. (R 36-37) Following his arrest, Petitioner's statements to police was exculpatory as to his intent. He told the police officer that he did not know why he attempted to break into the house. (R 33)

The evidence established that the petitioner cut through the screen of a back door to the house which appeared to be dark. However, there were lights on in the house. He then

placed his hand through the screen in an attempt to unlock the door. At this point, he was interupted and fled. (R 11-14, 21-23)

The state chose to allege in the information that the petitioner attempted the burglary with the intent to commit theft. (R 91) Over defense objection, the state was allowed to ask the owner of the house about things of value which were contained in the dwelling. The owner admitted that he had some guns, jewelry and the usual items of value contained in his home. (R 26) Petitioner contends that the evidence was insufficient to support a conviction of burglary where the intent to commit theft was not supported by the evidence. This Court stated in State v. Waters, 436 So.2d 66 (Fla. 1983) that the failure to allege the intent to commit a specific offense was not fundamental error. However, this Court stated that an allegation of a specific offense is the better practice. Regardless, such intent, along with other elements, must then be proved beyond a reasonable doubt in order for a verdict of guilt and judgment thereon to be proper.

The circumstances in State v. Waters, supra, resulted in the conclusion that there was sufficient evidence for the trier of fact to properly conclude that Waters intended to commit theft at the time of the entry. The rented room had the door padlocked from the outside. It could be inferred from this fact that Waters knew that no one was inside the room, thus negating any attempt to commit a crime against a person such as murder, robbery, rape, assault or battery. Waters carried a pair of

pliers, but no explosive or flammable materials, thus negating any attempt to commit the offense of arson. Through the process of elimination, this Court found the circumstances to inconsistent with any hypothesis of the intent to commit any crime other than theft. Id.

Circumstances of the instant case do not rule out the other possible offenses that the petitioner may have intended to commit once inside the house. Unlike State v. Waters, supra, the back door was not padlocked from the outside. It was approximately 10:15 in the evening, a time when many people are asleep in their suburban homes. An equal number may be away from home with the doors locked. Petitioner had a knife in his hand during the attempted burglary of a dwelling in which people were in fact home. Thus, the hypothesis that the petitioner may have formed the intent to commit an offense against a person cannot be ruled out. Thus, the state failed to prove the charge as alleged in the information. See VanTeamer v. State, 417 So.2d 1129 (Fla. 5th DCA 1982) and Krathy v. State, 406 So.2d 53 (Fla. 1st DCA 1981).

CONCLUSION

Based upon the foregoing cases, authorities and policies, Petitioner respectfully prays that this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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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, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Bruce Allen Graham, Inmate No. B-050274, Baker C. I., Post Office Box 500, Olustee, Florida 32072 this 11th day of September, 1984.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER