IN THE SUPREME COURT OF FLORIDA

SAMUEL TOOLE,

Petitioner,

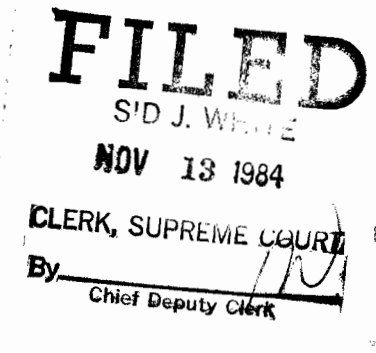
vs. CASE NO. 66,018

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON THE MERITS



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PRELIMINARY STATEMENT

Respondent, State of Florida, was the prosecution in the trial court and the appellee in the appellate court and will be referred to as Respondent. Petitioner was the defendant in the trial court and the appellant in the appellate court and will be referred to as Petitioner.

Reference to the record on appeal will be referred to by the use of the symbol "(R-)" followed by the appropriate page number in parenthesis. Reference to the opinion of the First District Court of Appeal attached to Petitioner's brief in this cause will be referred to by "Op" followed by the appropriate page number in parenthisis.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and statement of the facts as a reasonably accurate summary. Additional facts will be included where necessary in the argument portion of the brief.

ISSUE

THE FIRST DISTRICT COURT OF APPEAL DID NOT ERR IN FINDING SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF INTENT TO COMMIT WHERE ISSUE WAS PROPERLY PLACED BEFORE THE TRIER OF FACT WHO FOUND DEFENDANT GUILTY OF BURGLARY WITH INTENT TO COMMIT THEFT.

The sole issue on appeal is whether the First District Court of Appeal applied the proper standard of review in affirming Petitioner's conviction for burglary and possession of a burglary tool resulting from a jury verdict of guilty. Respondent submits the District Court was correct in not substituting its judgment for that of the jury on the evidentiary issue. The judgments and sentences must be affirmed.

Petitioner is correct in his assertion the state, when it charges burglary with intent to commit a specific crime, must prove that particular crime was intended. However, the issue of intent is one for the trier of fact to determine based upon all of the circumstances shown by the evidence adduced at trial. State v. Waters, 436 So.2d 72 (Fla. 1983); Dobry v. State, 211 So.2d 603 (Fla. 3rd DCA 1968); Jones v. State, 192 So.2d 285 (Fla. 3rd DCA 1966). Furthermore, where the circumstances are such that the trier of fact was properly able to conclude the defendant

intended to commit the crime of theft, the district appellate court should not substitute its judgment for that of the judge or jury. State v. Waters, 436 So.2d at 73. As in this case, often the only method by which the prosecution can show intent is by circumstantial evidence. Id. at 71.

The fact circumstantial evidence is involved makes no difference. The burden on the state to prove intent is the same. However, in State v. Allen, 335 So.2d 823, 826 (Fla. 1976), the Supreme Court recognized there were varying interpretations of circumstantial evidence and that in all circumstantial evidence cases there would be alternate interpretations. The Court pointed out though that the "state is not obligated to rebut conclusively every possible variation, however, or to explain every possible construction in a way in which is consistent only with the allegation against the defendant. Were those requirements placed on the state for those purposes, circumstantial evidence would always be inadequate to establish a preliminary showing of the necessary element of the crime." While Allen referred to the quantum of proof necessary to demonstrate a corpus delicti, the same rationale is applicable here.

It has long been the law in Florida that at the motion for judgment of acquittal stage, the state need not disprove all reasonable hypothesis of innocence. Rather, the motion

should be granted only where there is no view which would support a finding of guilt. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. den., 428 U.S. 911, 96 S.Ct. 2227, 49 L.Ed.2d 1221 (1976). The test in review is whether the jury might conclude the evidence fails to exclude every reasonable hypothesis but that of guilt not whether the trial or appellate courts so conclude. Muwwakil v. State, 435 So.2d 304, 305 (Fla. 2nd DCA 1983), cert. den., 444 So.2d 417 (Fla. 1984); Maisler v. State, 425 So.2d 107, 109 (Fla. 1st DCA 1982), cert. den., 434 So.2d 888 (Fla. 1983). Whether a jury could reasonably return a verdict of guilty depends on whether there is a reasonable hypothesis of innocence. This Honorable Court has repeatedly recognized that it is for the jury to determine what is a reasonable hypothesis of innocence. See, e.g., Heiney v. State, 447 So.2d 210 (1984); Rose v. State, 425 So.2d 521 (Fla. 1982), cert. den., ___ U.S.___, 83 S.Ct. 1883, 76 L.Ed.2d 812 (1983); Cf. Lowery v. State, ___ So.2d ___ (Fla. 1st DCA 1984), [9 F.L.W. 1134].

The Eleventh Circuit Court of Appeal's opinions are consistent with Florida law. In stating the applicable standard of review in a sufficiency of the evidence challenge the Court in United States v. Bell, 678 F.2d 547, 549 (5th Cir., Unit B, 1982) (en banc); affirmed, 76 L.Ed.2d 638 said:

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence. (Emphasis supplied.)

See also, United States v. Kincaid, 714 F.2d 1064, 1065-1066 (11th Cir. 1983).

Moreover, the United States Supreme Court has recognized that it is not realistic to require the prosecution to dispose all possible reasonable hypothesis of innocence before a case is allowed to go to the jury. Jackson v. Virginia, 443 U.S. 307, 326, 99 S.Ct. 2781, 61 L.Ed.2d 560, 578 (1979). See also, Holland v. United States, 348 U.S. 121, 139-140, 99 S.Ct. 127, 75 L.Ed.2d 150, 166-167 (1954) which was cited by this Honorable Court as justification for eliminating the circumstantial evidence instruction from the standard jury instructions.

However, in the instant case it is not necessary to reach the issue of whether the state removed every reasonable hypothesis but that of guilt. The Petitioner testified at his trial. His only hypothesis of innocence was rejected by the jury when it returned verdicts of guilty! Thus, a jury question was presented when Petitioner took the stand and denied the allegations. It was for the jury to decide

whether Petitioner was telling the truth and it chose not to accept Petitioner's story.

When Petitioner moved for his judgment of acquittal at the close of the state's case-in-chief "he admitted the facts which had been adduced in evidence as well as every conclusion favorable to the Appellee [Respondent] which is fairly and reasonably inferable therefrom..." Spinkellink, supra. Respondent submits the favorable conclusion of intent to commit theft is fairly and reasonably supported by the facts that, (1) Petitioner was observed prying open and entering a storage building attached to the building; (2) Petitioner was observed prying open and entering a barbeque area attached to the building; (3) Petitioner was observed using a ladder to gain access to the roof and was observed looking into a roof vent; (4) Petitioner was observed prying other doors to the main building; (5) Petitioner fled from the scene and ran into the woods when confronted; (6) a pry tool was located a short time after Petitioner fled in the area where he was apprehended; and (7) there was approximately $4,000 worth of inventory in the building. The jury was entitled to infer guilt by virture of Petitioner's flight from the area when confronted and the motion for judgment of acquittal was properly denied. See Straight v. State, 397 So.2d 903 (1981),

cert. den., 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 reh. den., 454 U.S. 1165, 102 S.Ct. 1043, 71 L.Ed.2d 323 (when a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment or some other indication such fact is admissible and is evidence of the person's consciousness of guilt which may be inferred from the act of flight or concealment.) (Emphasis supplied.)

Once the Petitioner took the witness stand and testified to his hypothesis of innocence all other possible hypothesis became irrelevant. Petitioner by virture of his testimony that he was merely passing through the area, was shot at and fled due to his fear put his credibility at issue with the jury. It was free to accept or reject his testimony. Having diregarded Petitioner's evidence "there remained sufficient other evidence in the record to reasonably support the jury's finding and conclusion." Atkinson v. State, 247 So.2d 793, 795 (Fla. 1st DCA 1971); Pittman v. State, 360 So.2d 1138 (Fla. 1st DCA 1978).

The District Court certified conflict with Bennett v. State, 438 So.2d 1034 (Fla. 2nd DCA 1983) on the basis of the sufficiency of proof necessary to sustain the charge. Respondent submits the First District was absolutely correct in holding:

> A reasonable jury was properly able to conclude that at the time Toole attempted to enter the building, he intended to commit the crime of theft therein.

(Op-4). See Heiney v. State, supra; Rose v. State, supra; United States v. Bell, supra; United States v. Kincade, supra. Moreover, Respondent asserts that Bennett "imposes a burden on the state not required by Waters." (Op-4). See Jackson v. Virginia, supra; State v. Allen, supra. The Second District improperly substituted its judgment for that of the trier of fact while the First District correctly held that the question of intent was one for the jury based on all of the circumstances shown by the evidence. (Op-3) (Citing State v. Waters.)

CONCLUSION

Petitioner's motions for judgment of acquittal should not have been granted unless there was no view by which the jury could infer guilt and the trial court properly denied same. There was substantial evidence of the crime of burglary. The jury could infer Petitioner intended to commit a theft in the building due to his flight from the scene upon the arrival of the authorities. The test on review is not whether in the trial or appellate court's opinion the evidence failed to exclude every hypothesis of innocence, but rather, the test is whether the jury might so conclude. Inasmuch as Petitioner testified thereby stating his reasonable hypothesis of innocence, the jury was free to accept or reject it. By virture of the jury's verdict of guilty it is clear it rejected Petitioner's story. By eliminating Petitioner's evidence there is sufficient evidence on which to support the verdict e.g., eyewitnesses, pry marks, flight, pry tool, etc. Finally, the Second District Court of Appeal was incorrect in improperly substituting its judgment for that of the jury in Bennett and this practice by the appellate court must be disapproved. This First District Court of Appeal applied the correct standard of review and properly affirmed.

Based on the foregoing argument and authority this Honorable Court should affirm the District Court's opinion in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to P. Douglas Brinkmeyer, Post Office Box 671, Tallahassee, Florida 32302, by hand delivery, this 13th day of November, 1984.

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