IN THE FLORIDA SUPREME COURT

SAMUEL TOOLE,

Petitioner,

v. CASE NO. 66,018

STATE OF FLORIDA,

Respondent.



ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

# BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

## TABLE OF CITATIONS

IN THE FLORIDA SUPREME COURT

| | | |
|---|---|---|
| SAMUEL TOOLE, | : | |
| Petitioner, | : | |
| v. | : | CASE NO. 66,018 |
| STATE OF FLORIDA, | : | |
| Respondent. | : | |
| | : | |

BRIEF OF PETITIONER ON THE MERITS

## I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the district court. The parties will be referred to as they appear before this Court. Attached hereto as an appendix is a copy of the decision of the First District. It will be referred to as "App." followed by the appropriate page number in parentheses. A one volume record on appeal, including transcripts, is sequentially numbered, and will be referred to as "R" followed by the appropriate page number in parentheses.

## II STATEMENT OF THE CASE

By information filed December 27, 1982, petitioner was charged with burglary of a structure and possession of a burglary tool (R 1). The cause proceeded to jury trial on April 20, 1983, before Circuit Judge J. Lewis Hall, Jr., and at the conclusion thereof petitioner was found guilty as charged on both counts (R 16-17). On May 25, 1983, petitioner was adjudicated guilty on both counts, declared to be a habitual offender, and sentenced to ten years in prison on each, to run concurrently (R 24-28; 45-49). On June 13, 1983, a timely notice of appeal was filed (R 36). On that date the Public Defender of the Second Judicial Circuit was reappointed to represent petitioner (R 41).

By opinion filed September 26, 1984, the First District affirmed petitioner's convictions, and certified that its decision was in direct conflict with Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983). On October 12, 1984, a timely notice of discretionary review was filed.

## III STATEMENT OF THE FACTS

Joe Giles, Executive Secretary of the Moose Lodge in Tallahassee, testified that petitioner was not a member of that organization. The lodge is a ten thousand square feet concrete block building, which contains liquor, pool tables, pinball machines, and food. In the rear is a utility room which shares a common wall with the main building, but with no door into it, and a screened-in barbeque grill which has access to the kitchen. Giles went to the lodge on December 4, 1982, and saw the front door had been pried open, as well as the door to the utility room (R 93-102).

Sammy Gay, a member of the lodge, testified that he and Jim Alexander left the lodge at 2:00 a.m. on December 4. They went to a store for some beer and then returned to the lodge. They sat under a big oak tree behind the building. At 2:30 or 2:45 a.m., they saw a white male, holding a long object, pry at the door. The man went inside the storage room and came out. He then went to the barbeque area and found a ladder, which he used to go up onto the roof. He came down and went into the barbeque area again. Jim left to call the Sheriff's Office and then a deputy arrived and the man ran off. The deputy brought petitioner out of the woods (R 106-111). Jim Alexander testified he and Mr. Gay saw the man at the building. Alexander went to a nearby pay phone and called

the sheriff. The female deputy responded and he directed her to the lodge building. Later they brought a man out of the woods (R 113-22).

Club Manager Sara Windham and member Edward H. Gainous testified that they closed up the lodge at 2:00 a.m. and locked the doors. While they were cleaning up inside, they heard a noise like someone walking upstairs. They left through the front door, which had been damaged and saw the officers bring a suspect back. The burglary alarm had not been activated that night (R 123-33).

Leon Couty Deputy Sheriff Laurel Moore testified that at 3:08 a.m. she responded to the call and spoke with Mr. Alexander at the pay phone. She looked over to the lodge and saw someone standing at the back of the building. She identified herself and told the suspect to stop. He ran and Deputy Dennis apprehended him. She noted pry marks on the doors of the building. Petitioner said he was taking a short cut home (R 133-41).

Deputy Sheriff Craig Dennis also responded to the call. He walked up on the north side of the building and heard Dupty Moore yelling. He saw a white male run into a wooded area. Deputy Dennis identified himself and shot at the suspect. He pursued on foot and stopped him in the woods. Petitioner said he was walking home to a nearby trailer park. Deputy Dennis identified a screwdriver which Sergeant Gunter

found in the woods where petitioner was apprehended (R 144-50). William P. Gunter, Identification Technician, testified that he responded to the scene and found a long slot-head screwdriver in the woods. He determined the pry marks on the doors were the same size as the screwdriver (R 153-61). The state rested.

Petitioner's counsel moved for a judgment of acquittal, arguing that since the state had specifically alleged burglary with intent to commit theft, the state had to prove the intent to commit theft, and had not satisfied that element (R 161-62). The court denied the motion without comment (R 165).

Petitioner testified that he lived at the Seminole Trailer Park on December 4. He and a friend went to a saloon and later the friend dropped him off at the Britanny Estates Trailer Park. He walked from there south on the truck route to the Moose Lodge. He wanted to take a short cut to the Seminole Trailer Park so he went around the building. He heard someone hollering and heard a gun shot and ran into the woods. He did not know the police were chasing him. He denied trying to pry the doors and testified that he never saw the screwdriver before (R 166). Petitioner rested and the renewed motion for judgment of acquittal was denied. The jury subsequently returned its guilty

verdicts (R 220).

On appeal, petitioner again argued the evidence was insufficient to prove intent to commit theft, citing Bennett, supra, and State v. Waters, 436 So.2d 66 (Fla. 1983). The First District agreed with petitioner that the state, having specifically charged burglary with intent to commit theft, was required to prove that intent (App. at 4). However, the appellate court found sufficient circumstantial evidence of such intent, thereby creating a conflict with Bennett (App. at 3-4). This appeal follows.

## IV ARGUMENT

ISSUE

THE FIRST DISTRICT ERRED IN FINDING SUFFICIENT CIRCUMSTANTIAL EVIDENCE OF INTENT TO COMMIT THEFT WHERE PETITIONER NEVER GAINED ENTRY INTO THE LODGE BUILDING AND NEVER STOLE ANYTHING.

It is now well-settled that where the state charges burglary with intent to commit a particular crime, the state must prove the necessary intent for that specified crime. State v. Waters, supra. The same was true under the former breaking and entering statutes. Findley v. State, 174 So. 724, 128 Fla. 341 (1937). The former breaking and entering statutes contained great differences in the degree of the crime, dependent upon whether the state alleged and proved intent to commit grand larceny or petit larceny. See, e.g., Sections 810.01, 810.02, and 810.05, Florida Statutes (1973). Thus, the intent element was often hotly disputed. While the present burglary statute, Section 810.02, Florida Statutes (1983) contains no such distinction between intent to commit grand theft or intent to commit petit theft, since State v. Waters holds that the intent element is still present, and examination of the older breaking and entering cases is essential to show that the circumstantial evidence of intent was insufficient in the instant burglary case. It is also

necessary because the intent element elevates an unarmed misdemeanor trespass to a felony burglary. Compare Sections 810.08 and 810.09, Florida Statutes (1983).

In McNair v. State, 55 So. 401, 61 Fla. 35 (1911), the defendant was charged with breaking and entering with intent to commit petit larceny. He was discovered at 4:30 a.m. asleep, in a room which contained only furniture. This Court found no evidence of intent to steal, because he had entered the house in a drunken condition and looked for a place to sleep. This Court further found that there was a reasonable hypothesis of innocence to negate the intent element: "The crime proven may have been a drunken trespass - - nothing more". 61 Fla. at 41.

In Jalbert v. State, 95 So.2d 589 (Fla. 1957), the defendant was charged with breaking and entering with intent to commit grand larceny. The evidence showed that he was in possession of a metal tray and microphone which had been stolen from the victim's house. The house contained several thousand dollars of personal property, none of which was taken. The state argued the mere presence of so much property inside showed, in and of itself, the intent to commit grand larceny, even though only two small items were taken. This Court rejected the state's simplistic argument and found no evidence of intent to commit grand larceny:

> We cannot say that merely because there was in the dwelling personal property worth in excess of $50 the defendant intended to steal more than he did. In the absence of other evidence or circumstances the best evidence of what he intended to steal is what he did steal.

Id. at 592.

In Rumph v. State, 248 So.2d 526 (Fla. 1st DCA 1971), the First District attempted to understand this Court's Jalbert holding:

> We conceive the following to be a fair statement of the rule prevailing in this date on the present subject: When a person is charged with breaking and entering with intent to commit grand larceny, an essential element of that offense is his intent at the time of his breaking and entering to commit grand larceny (that is to steal property of the value of $100 or more), which element must be proven at the trial. While, in the absence of "other evidence or circumstances," the best evidence of his intent is what he did steal, nevertheless, his said intent may be proven by such other evidence or circumstances.

Id at 529. Since there was only $24.00 worth of property stolen, the court reduced the conviction to breaking and entering with intent to commit petit larceny.

In Griffin v. State, 276 So.2d 842 (Fla. 4th DCA 1973), the defendant was charged with breaking and entering with intent to possess narcotic drugs. He was found at 4:00 a.m. hidden in a doctor's office. The court found no evidence of

the necessary intent:

> The requisite intent may be proved by either circumstantial or direct evidence, but, as here, circumstantial evidence is used, the facts must exclude every other hypothesis. Mere proof of breaking and entering does not warrant an inference that the accused intended to commit a felony.
>
> * * *
>
> Here defendant was found inside the building. He was apparently under the influence of drugs at the time he entered the building. Other reasonable hypotheses here are that defendant entered with intent to steal money, or medical records, or to steal non-narcotics drugs or to steal narcotic drugs, rather than to "possess" them.

Id. at 843.

Finally, in West v. State, 289 So.2d 758 (Fla. 3d DCA 1974), the defendant was charged with breaking and entering with intent to commit grand larceny. He had been caught leaving the building with two keys in his possession. There were several valuable office equipment items undisturbed inside. The court, citing Jalbert found no intent to commit grand larceny since only two keys were taken.

The above cases, decided under the former breaking and entering statutes, demonstrate three principles. First, where the state charges burglary with intent to commit a specific crime, that intent must be proven. Second, where there is a reasonable hypothesis of innocence to rebut the intent ele-

ment, or evidence of some other intent, the courts will not hesitate to reverse the conviction. Third, where no intent is shown, the crime is not a burglary at all, but rather a trespass. These principles, when applied to the facts of the instant case, show how the First District has reached an erroneous decision in finding intent to commit theft. Taking the evidence in the light most favorable to the state, and disregarding appellant's exculpatory statement to the police and his trial testimony, the state proved that appellant tried to pry open the doors into the main building of the lodge. He then went into the storage area and then into the barbeque area, then up onto the roof, and then back into the barbeque area. All of these activities were done for some unknown reason, with some unproven intent. The First District's conclusion that he intended to steal because there was money, liquor, food, vending machines, and appliances inside is as simplistic as the identical argument made by the state in Jalbert, which this Court squarely rejected. Even assuming, arguendo, that petitioner had successfully made it inside the main lodge building where the items were, there exists a reasonable hypothesis of innocence that he could have intended to sleep there, as McNair did. There exist a reasonable hypothesis of innocence that he could have intended to commit criminal mischief inside by destroying the interior by fire or otherwise,

because he once sought to join the Moose Lodge and had been rejected, or because he disliked private social clubs. Any number of reasonable hypotheses of innocence may be conjured up to rebut the intent element.

The First District held that Bennett, in requiring the state "to exclude the possibility that defendant intended to commit other offenses, including arson or vandalism. . . imposes a burden on the state not required by Waters". (App. at 4). This view completely ignores the time-honored rule of circumstantial evidence, that the state must rebut any and all reasonable hypotheses of innocence. See, e.g., McArthur v. State, 351 So.2d 972 (Fla. 1977).

The result under the present burglary statute should be no different, as even the First District has realized in another similar case. In Krathy v. State, 406 So.2d 53 (Fla. 1st DCA 1981), the defendant was charged with burglary with intent to commit theft. The victim had heard glass breaking in a back room of her house and went to the doorway of that room. Krathy was attempting to climb through the window, but when saw her, he fled. The court found no evidence of intent to commit theft and reduced the conviction to trespass. Likewise in McWatters v. State, 375 So.2d 624 (Fla. 4th DCA 1979), the defendant was found in the back seat of an auto. In the trunk were stolen saddles. The court applied the circumstantial evidence test to find no proof of intent:

> The proof of intent in this case was exclusively circumstantial evidence; and to sustain a conviction such proof had to be not only consistent with the appellant's guilt but also inconsistent with any reasonable hypothesis of innocence.

Id. at 625. On the other hand, in Miller v. State, 438 So.2d 942 (Fla. 1st DCA 1983), the defendant broke into a house to steal some food, so the court found sufficient circumstantial evidence of intent to commit theft.

Again, the gravaman of burglary, which sets it apart from trespass is the intent to commit some crime inside the building. The state did not prove petitioner's intent, and further did not disprove the reasonable hypothesis that he intended to, at the worst, attack the club manager, burn the premises, or damage the equipment, or, at the best to go to sleep. This Court must find the evidence insufficient to support the burglary conviction, and vacate it in favor of a conviction of trespass.

## V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the opinion on the First District, vacate the judgment and sentence for burglary and remand with directions that a judgment and sentence be entered for trespass of an occupied structure.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on the Merits has been furnished by hand delivery to Mr. Thomas Bateman, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and by U.S. Mail to petitioner, Samuel Toole, #A-557918, Post Office Box 37, Chattahoochee, Florida 32324 on this 24 day of October, 1984.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER