SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 66,133

NATAL EL-RA-SUL,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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Preliminary Statement

Petitioner was the prosecution in the trial court and appellee in the District Court of Appeal and will be referred to as "Petitioner." Respondent, Natal El-Ra-Sul, was the defendant in the trial court and the appellant in the District Court of Appeal and will be referred to as "Respondent."

The record on appeal consists of one bound volume which will be referred to by the symbol "R" followed by the appropriate page number in parentheses and one volume of transcript which will be referred to by the symbol "TR" followed by the appropriate page number in parentheses.

Petitioner directs the attention of the Court to State v. Donald, No. 64,652, State v. Phillips, No. 64,647, and State v. O'Neal, No. 64,977 which are currently pending in this Honorable Court in which similar and related certified questions are presented.

The opinion of the First District Court of Appeal is appended hereto. The lower case is reported at 456 So.2d 1244 (Fla. 1st DCA 1984).

STATEMENT OF THE CASE AND FACTS

Respondent was charged by amended information dated March 11, 1980 with felony petit theft arising from the January 24, 1980 theft of less than one hundred dollars from Montgomery Wards, in Jacksonville, Florida. (R 1). The amended information was captioned "FELONY PETIT THEFT" and referred in the text to a violation of Section 812.014(2)(c), Florida Statutes. Id.

A notice of intent to seek a felony petit theft sentence was filed on the 16th day of June, 1980 which indicated Respondent had previously been convicted of petit theft twice before. (R 2). On the same date Respondent entered a plea of guilty to the amended charge. She was adjudicated guilty and sentenced to thirteen months imprisonment. (R 3-5).

No pretrial motions attacking the information were filed prior to entry of the plea.(R 13). No direct appeal was taken.

On February 2, 1984, a Rule 3.850 motion for post conviction relief was filed stating as grounds for relief that because the information failed to allege that Respondent had been previously convicted of petit theft the information only charged a misdemeanor. Consequently, she argued the circuit court lacked jurisdiction to accept a guilty plea or to render a judgment and sentence. (R 6-10).

The trial court found that the motions, files and records of the case stated a prima facie case for relief and a hearing was held on February 22 and March 2, 1984. (TR 2-32).

The trial judge entered his order denying relief stating he was not bound by the First District Court of Appeals decision in Phillips v. State, 438 So.2d 886 (Fla. 1st DCA 1983) inasmuch as the identical issue was then before this Honorable Court as one of great public importance. (R 17-19). Rather, he chose to rely on the dissent in Phillips. (R 19).

The First District Court of Appeal reversed the trial court in an opinion filed October 24, 1984 finding error in the court's failure to follow Phillips. Judge Joanos dissented in part instead agreeing with Judge Wentworth's dissenting opinion in Phillips. However, he concurred with the majority in certifying the question set forth in the majority opinion. (Exhibit A, p. 4).

Petitioner filed its notice to invoke discretionary jurisdiction on November 6, 1984 and on November 9, 1984 this Honorable Court issued a briefing schedule. On December 19, 1984 this Honorable Court entered its Order staying further proceedings in District Court of Appeal, First District, and in the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida pending disposition of the Petition for Review. This appeal follows.

QUESTION CERTIFIED

The Court of Appeal, First District, certified the following as a question of great public importance pursuant to Rules 9.030(a)(2)(v) and 9.120 F.R.App.P.

> Is a circuit court deprived of subject-matter jurisdiction when the caption of the charging document charges the defendant[s] with felony petit theft and the body thereof cites the proper Florida Statute, §812.014(2)(c), but the text of the charge alleges the value of the property to be less than $100 and does not specify the substantive elements of two prior petit theft convictions?

(See Exhibit A, p. 3)

STATUTE INVOLVED

The statute involved in the instant appeal is Florida's Felony Petit Theft Statute, Section 812.014(2)(c), Florida Statutes, which states:

> Theft of any property not specified in paragraph (a) or paragraph (b) is petit theft and a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Upon a second conviction for petit theft, the offender shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree, punishable as provided in ss. 775.082, 775.083, and 775.084.

POINT ON APPEAL

THE INFORMATION PROPERLY CHARGED THE OFFENSE OF FELONY PETIT THEFT AND THE CIRCUIT COURT PROPERLY ACQUIRED SUBJECT MATTER OVER THE CAUSE

ARGUMENT

In this cause the charging document cited the Felony Petit Theft statute and the information was captioned "Felony Petit Theft". (R 1). However, the text of the charging paragraph alleged value of the propertyat less than $100.00 and did not specify the prior convictions. Id. Respondent in a Rule 3.850 post conviction relief motion argued that these omissions meant that only a misdemeanor was charged; thus, the circuit court never acquired jurisdiction to hear the case. She relied upon Phillips v. State, supra, arguing the guilty plea, judgment and sentence were void. Respondent maintained the defect was jurisdictional and could be noted even though no objection or motion to dismiss the information was made in the circuit court. In a Per Curiam opinion of the Court of Appeal, First District, the cause was reversed. The Court of Appeal noted that the circuit court had failed to follow Phillips and was thus in error. However, the Court certified (albeit in different language) the precise question it had certified in Phillips, (Exhibit A). Petitioner submits that the ruling in Phillips is dispositive of the issue in this cause.

State v. Harris, 356 So.2d 315 (Fla. 1978), addressed Section 812.014(2)(c), Florida Statutes, and declared it a separate "substantive offense." Id. at 316. This Honorable Court stated:

> Section 812.021(3) provides in pertinent part, that upon the third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree (rather than a misdemeanor in the second degree). This statute creates a substantive offense and is thus distinguishable from Section 775.084, the habitual criminal offender statute.

Id. at 316. This Court further concluded that the Florida Legislature had the right to create the substantive offense of "felony petit larceny," but the judiciary possessed the right to "dictate the procedure to be employed in the courts to implement it." Id. at 317 citing Article V.,Section 2, Florida Constitution.

State v. Harris, specifically disavows the procedure implicitly advanced in Phillips and relied upon by the district court in its opinion sub judice whereby specific information concerning the prior convictions is contained within the charging document.

> We therefore hold that Section 812.021(3) creates a substantive offense to be tried in the circuit court when felony petit theft is charge, without bringing to the attention of the jury the fact of prior convictions as an element of the new charge. Upon conviction of the third petit larceny, the Court shall, in a separate proceeding, determine the historical fact of prior convictions, and questions regarding identity in accord with general principles of law, and by following the procedure now employed under Section 775.084.

356 So.2d at 317.

The procedure set forth by this Court is that the fact of prior convictions will not be brought to the jury's attention during the trial, but developed in a subsequent separate hearing. A separate proceeding is necessary so as not to destroy the presumption of innocence in favor of the defendant. Pugh v. State, 423 So.2d 398 (Fla. 1st DCA 1982); State v. Harris at 317. The viability of this logic is readily apparent from the instant case. Here Respondent obviously knew the nature of the charges against her and was not hampered in any manner in her preparation for trial. However, as in Phillips the majority concluded the information was inadequate to confer subject matter jurisdiction in the circuit court. Petitioner disagrees as did Judge Wentworth in his dissenting opinion in Phillips.

Proper jurisdictional allegations are as essential in an accusatory document as are those allegations relating to material elements of a crime. State v. Black, 385 So.2d 1372, 1375 (Fla. 1980). Florida caselaw holds that questions concerning subject matter jurisdiction involve a claim of fundamental error and can be raised at any time - even for the first time on appeal. Christopher v. State at 407; Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); Dicaprio v. State, 352 So.2d 78, 79 (Fla. 4th DCA 1977) cert. denied, 353 So.2d 679 (Fla. 1977); Solomon v. State, 341 So.2d 537 (Fla. 2d DCA 1977); Pope v. State, 268 So.2d 173 (Fla. 2d DCA 1972) rehearing denied. It is Petitioner's position that the information in this case tracked the appropriate language of the statute, was captioned "Felony Petit Theft"

and cited the controlling statute, Section 812.014(2)(c), Florida Statutes, and was thus sufficient to confer jurisdiction in the circuit court. By citing the Felony Petit Theft Statute and using that caption on the information, Petitioner has incorporated by reference the language of the cited section defining felony petit theft. (See dissenting opinion, J. Wentworth, Phillips at 2271). See also: State v. DiGuillio, 413 So.2d 478, 479 (Fla. 2d DCA 1982); Martinez v. State, 368 So.2d 338 (Fla. 1979); State v. Pajon, 374 So.2d 1070 (Fla. 3d DCA 1979). (where an information tracks the language of the statute and refers to a statute is is generally held sufficient).

In Jones v. State, 415 So.2d 852 (Fla. 5th DCA 1982), the Fifth District held that if the information recites the appropriate statute alleged to be violated, and if the statute clearly includes the omitted words, it cannot be said that the imperfection of the information prejudiced the defendant in his defense. Hence Respondent and the circuit court was on notice that the theft described in the information was the "third or subsequent conviction for petit theft." Section 812.014(2)(c), Florida Statutes. The information need not include the specific prior convictions. State v. Harris. Respondent obviously understood the nature of the charge against her and recognized the jurisdictional sufficiency of the information as she did not raise a pretrial challenge to the charging document pursuant to Rule 3.190(c)(4), Florida Statutes. Rather, by entry of a guilty plea Respondent waived any motion to dismiss save one based on

fundamental grounds. Fla.R.Cr.P. 3.190(c). The State also emphasizes that Respondent failed to object to the reliance of her prior convictions which in itself satisfies the jurisdictional requirement of "third or subsequent conviction for petit theft." Pugh v. State at 399.

Reliance upon Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981) would be misplaced. In Christopher, the defendant was charged by an information labeled "Grand Theft" but which charged the theft of merchandise of a value less than one hundred dollars. Subsequently, the State filed notice to prosecute as a subsequent offender pursuant to Section 812.014(2)(c), Florida Statute (1979). The defendant negotiated a plea to attempted grand theft and challenged the circuit court's jurisdiction on appeal. The instant facts are not analogous.

In Christopher, the title of the charging document alleged a theft of less than $100.00 Thus, the caption (grand theft) was negated by the specific allegation of the amoung involved. There was nothing else within the charging document which served to reference the enhancement provisions of the statute defining a felony based on other convictions. See Phillips (J. Wentworth, dissenting). Furthermore on appeal in Christopher, the State argued the use of the word less was a typographical error; the State intended to charge the defendant with theft of more than $100.00. The Court of Appeal, Fifth District, held the mistake to be fundamental. The information charged only a misdemeanor. However, the Fifth District opined that "if the proper procedure

is followed, a felony petit charge is sufficient to vest jurisdiction in the circuit court;" Id. at 407.

Judge Upchurch, writing for the District Court in Christopher advised of the proper procedure for the State to pursue:

> Had the State moved to amend the information as it should have done, the substantive offense of felony petit theft would have vested jurisdiction in the circuit court. Not only did the State fail to amend the information, but the proceedings were lacking the safeguards that Harris mandates.

397 So.2d at 407. The State interprets this instruction to require the amendment of the information to allege "Felony Petit Theft" rather than "Grand Theft." No mention is made of adding factual information which would identify the prior convictions. Such action would still be inadequate to divest jurisdiction unless the "Grand Theft" caption was also altered.

Reliance on Brehm v. State, 427 So.2d 825 (Fla. 3d DCA 1983) would also be unsound. There the charging document failed to allege the specific statutory provision under which Defendant Brehm was charged. It appeared Brehn was charged and convicted of ten counts of violating Section 877.08(2) and (3), Florida Statutes (1981), Tampering with a Parking Meter, which is ordinarily a misdemeanor offense. However, subsection (4) provides for enhancement to a third degree felony upon prior conviction for the same offense. It was under this subsection that the State intended to charge Brehm in circuit court. However, the information filed did not specify the subsection and referred only to the general statutory provision. Nothing in the charging instrument could be construed to incorporate by reference

the provisions of the statute necessary to confer jurisdiction in the circuit court. These are not the facts of this cause and application of the Christopher - Brehm holding is inappropriate. The holding in Brehm would apply in Respondent's case only if the State had charged violation of Section 812.014. However, the instant information specified a violation of subsection (2)(c) and carried a "Felony Petit Theft" caption.

In following Phillips which held the alleged defect to be fundamental, the District Court overlooked the holding of this Honorable Court in State v. King, 426 So.2d 12 (Fla. 1982) as well as its own opinion in State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1977). In State v. King, a juvenile prosecuted as an adult pursuant to Section 39.031, et seq. Florida Statutes, but not charged with a life or death offense was charged by indictment rather than by information. The juvenile was deemed to have waived the substantive right to be treated as a juvenile, which is jurisdictional by means of the charging device, if the issue was not raised in a timely manner before the trial court. In setting forth its ruling in King, this Court reasoned that the accused should not be permitted to subject himself to a court's jurisdiction and defend his cause in the hope of an acquittal, and then if convicted, challenge the court's jurisdiction on the basis of a defect that could have been remedied if brought to the trial court's attention in a timely manner. Id. at 15. Thus a "jurisdictional" defect may be waived. The circumstances of Respondent are nearly identical.

In State v. Cadieu, the Court of Appeal, First District, noting the same concerns voiced in State v. King, held that a more liberal standard of review must be utilized when a timely challenge is not made. Id. at 151; see also, Fountain v. State, 92 Fla. 262, 109 So. 463 (1926). Judge Smith, writing the majority opinion, stated:

> The information is cast in the statutory language. Though it is imperfect because it does not descend from statutory generalities to essential particulars, the information is not so defective that it is vulnerable to initial post-trial attack. When confronted with an information that is defective only in failing to charge particulars within a generic statutory description of proscribed conduct, the accused must either challenge the information by motion, thus providing opportunity for a new and curative information or be satisfied with resolving his doubts by discovery and a motion for statement of particulars. The law does not favor a strategy of withholding attack on the information until the defendant is in jeopardy, then moving to bar the prosecution entirely. Sinclair v. State, 46 So.2d 453 (Fla. 1950).

Id.

As the foregoing quote indicates, State v. Cadieu comports with Judge Wentworth's dissenting opinion in Phillips. The instant information is cast in "statutory language"; it "does not descend from statutory generalities to essential particularities"; it "is defective only in failing to charge particulars within a generic statutory description of proscribed conduct. . . ." Id. at 151. The holding in State v. Cadieu, is directly applicable here. Inasmuch as Respondent did not challenge the information pretrial and did not take a direct appeal she has waived the right to do so.

The same concept was addressed by the Third District Court of Appeal in Peek v. Wainwright, 393 So.2d 1176 (Fla. 3d DCA 1981). There, the defendant challenged his conviction by petition for habeas corpus filed in the state courts. His specific allegation was that he has been sentenced and was serving time for which he was never charged or convicted. Peek had never been charged in circuit court with felony petit theft, but was ultimately sentenced for that offense. Admittedly, jurisdiction in the circuit court was acquired in his case due to other felony charges. What is of importance to this case however is the attempt by the Third District Court of Appeal to extend due deference to the intent of the Florida Legislature when enacting the Felony Petit Theft Statute and of this Court's interpretation of that statute in State v. Harris. The opinion of the First District in Phillips relied on sub judice overlooks the express intent of the Florida Legislature to punish three time offenders of petit theft. It is also inconsistent with State v. Harris. The considerations set forth in Peek v. Wainwright should apply here.

The logic of the First District was undermined by the subsequent opinion of the court in Pickelsimer et al v. State, 9 F.L.W. 2670 (Fla. 1st DCA 1983). Identical jurisdictional arguments were submitted by each of the seven defendants represented in that consolidated opinion. Jurisdiction was raised in the circuit court pursuant to a pretrial motion to dismiss the information and served as the basis for appeal. Yet the First

District did not address the jurisdictional aspect. The court refused to "speculate" as to the outcome if the defendants had not filed motions to dismiss.

With all due respect to the First District, the issue presented sub judice is either jurisdictional or it is not. If it is, the circuit court would have been without authority to hear or to rule upon a motion to dismiss the information even if one had been timely filed. The entire proceeding would be a nullity. The court would not be able to choose to reach the "asserted jurisdictional nature of the omissions here in question." Id. Jurisdiction is the key. It is not "speculation" unless the issue is viewed from the dissenting opinion in Phillips[1]. Of course if the rationale of State v. King and State v. Cadieu is applied so that a more liberal standard of review is utilized for jurisdictional issues even when untimely raised, then the opinion in Pickelsimer is proper. However in that event, the holding of King and Cadieu would apply equally well in the instant cause. Under such application it is apparent that Respondent waived whatever nonfundamental jurisdictional defects which may have existed. The Pickelsimer and Phillips opinions cannot be reconciled by any other reasoning. Accord, State v. Gray, 435 So.2d 816, 818 (Fla. 1983).

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1 Judge Wentworth wrote the majority opinion in Pickelsimer, the dissenting opinion in Phillips.

* * * * * * *

In the alternative, Petitioner contends that because this issue was not raised by way of direct appeal when it could have and should have been raised, the issue is not cognizable by Rule 3.850 motion. Thus, the trial court's denial of 3.850 relief was correct though it may have been based on an erroneous or different reason. Savage v. State, 156 So.2d 566 (Fla. 1st DCA 1963).

This Honorable Court has addressed what issue must be raised on direct appeal after entry of a guilty plea. In Robinson v. State, 373 So.2d 898 (Fla. 1979), the Court stated:

> There is an exclusive and limited class of issues which occur contemporaneously with the entry of a plea that may be the proper subject of appeal. To our knowlege, they include only the following: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea. 373 So.2d at 902. (Emphasis added)

Thus, the failure to raise the above stated issues on appeal bars Respondent from doing so by way of a 3.850 collateral attack.

This area of the law has been addressed by the Supreme Court in numerous recent death cases. Rather than cite case after case which hold that matters which could have been raised on direct appeal but were not are not cognizable in a 3.850 collateral proceeding, Petitioner will cite only McCrae v. State, 437 So.2d 1388 (Fla. 1983) (Alderman, C.J. concurring). Stating the very purpose of Rule 3.850 Chief Justice Alderman wrote:

> The purpose of the Rule 3.850 motion is to provide a means of inquiry into the alleged consitutional infirmity of a judgment or sentence, not to review ordinary trial errors cognizable by means of a direct appeal. Ratliff

> v.State, 256 So.2d 262 (Fla. 1st DCA 1972). The motion procedure is neither a second appeal nor a substitute for appeal. Matters which were raised and decided adversely to the movant are not cognizable by motion under Rule 3.850. E.g., Christopher v. State, 416 So.2d 450 (Fla. 1982); Dismuke v. State, 388 So.2d 1324 (Fla. 5th DCA 1980); Faulkner v. State, 226 So.2d 441 (Fla. 2d DCA 1969). Furthermore, any matters which could have been presented on appeal are similarly held to be foreclosed from consideration by motion under the Rule. E.g., Demps v. State, 416 So.2d 808 (Fla. 1982); State v. Jackson, 414 So.2d 281 (Fla. 4th DCA 1982); Battle v. State, 388 So.2d 1323 (Fla. 5th DCA 1980); Tyner v. State, 363 So.2d 1165 (Fla. 1st DCA 1978); Koedatich v. State, 287 So.2d 738 (Fla. 3d DCA 1974); Yanks v. State, 273 So.2d 401 (Fla. 3rd DCA 1973), cert. denied, 277 So.2d 288 (Fla. 3rd DCA 1972), cert denied, 263 So.2d 829 (Fla. 1972); Austin v. State, 160 So.2d 730 (Fla. 2nd DCA 1964). Therefore, a Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied. E.g., Foster v. State, 400 So.2d 1 (Fla. 1981); Edwards v. State, 364 So.2d 119 (Fla. 1st DCA 1978); Jenkins v. State, 267 So.2d 886 (Fla. 2d DCA 1972).

437 So.2d at 1390.

It is apparent then that the trial court could have properly summarily dismissed Respondent's Rule 3.850 motion for failure to raise the issue of jurisdiction on direct appeal. Because the court's denial of relief was proper and correct though for a different reason than articulated in its written order, the trial court's order denying relief should have been affirmed. See Savage, supra.

Moreover, this Honorable Court has pointed out that the doctrine of finality dictates the use of a Rule 3.850 motion should never be substituted for a direct appeal. See McCrae, supra.

This doctrine should only be abridged when a more compelling objective appears, "such as ensuring fairness and uniformity in individual adjudications." Witt v. State, 387 So.2d 922, 925 (Fla. 1980). In Witt the Court noted that the limited machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice. The Court said:

> Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of obvious injustice... (387 So.2d at 925).
>
> [W]e note that the essential consideration in determing whether a new rule of law should be applied retroactively are essentially three: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and, (c) the effect on the administration of justice of a retroactive application of the new rule. (Citations omitted) (387 So.2d at 926).
>
> ... For the policy reasons which underpin the finality of decisions, and because the imposition of any death penalty would be averted by a different construction of our rule, we now declare our adherence to the limited rule for post-conviction relief proceedings, even in death penalty cases. (387 So.2d at 927).

Therefore, the Court has made it clear that in the absence of a sweeping change in the law that would alter the final conviction and sentence, use of Rule 3.850 as a means of review of matters not raised on direct appeal which were known and should have been raised, will not be tolerated. McCrae, supra; Witt, supra.

Respondent has failed to demonstrate why her use of the Rule 3.850 motion rather than direct appeal was utilized. Further, she has failed to demonstrate a drastic change in the law by virtue of the opinion rendered in Phillips v. State, 438 So.2d 886 (Fla.

1st DCA 1983) which is the precise issue and has been certified to this Court. Petitioner submits an explanation for the delay in not pointing out the alleged defect in the information has not been clearly shown. Moreover, "the law frowns upon the policy of remaining silent as to fataly defective information until after the verdict" and then for the first time assert it in a post-conviction proceeding. It was Respondent's duty under the law to bring to the attention of the trial court the alleged defective information prior to pleading thereto. Sinclair v. State, 46 So.2d 453 (1950), reh. denied.

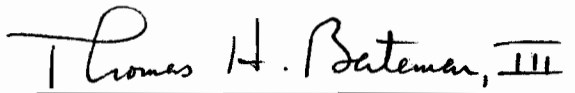
CONCLUSION

Based on the foregoing argument and authorities cited, Petitioner respectfully submits: (1) Respondent's failure to raise the instant issue on direct appeal is fatal to her in the present appeal from a denial of her Rule 3.850 post-conviction relief motion; (2) that the issue presented herein is not of a fundamental nature requiring reversal inasmuch as Respondent pleaded guilty to the charge of felony petit theft after properly being put on notice of the crime; and, (3) that the information sub judice was sufficient to confer jurisdiction upon the circuit court to accept Respondent's plea of guilty as well as to adjudicate and sentence her.

Accordingly, the certified question should be answered in the negative and the decision of the Court of Appeal reversed thereby affirming the judgment and sentence of the trial court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Michael Minerva, Post Office Box 671, Tallahassee, Florida 32302, on this 3RD day of January, 1985.

Thomas H. Bateman, III

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OF COUNSEL