IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIAM FOREMAN,

Respondent.

CASE NO. 66,212

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The STATE OF FLORIDA will be referred to as the "Petitioner" in this brief. WILLIAM FOREMAN will be referred to as the "Respondent". References to the Record on Appeal will be made by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Petitioner will adopt the Statement of Case and Facts as set out in its Initial Brief.

SUMMARY OF THE ARGUMENT

ISSUE II

The burglary count of the information in this case specified the offense that was the intended object of the entry. The Court instructed the jury in accordance with Fla. Stat. § 810.07(1983). And it instructed the jury that if the State's case failed to prove the intent to commit the offense charged as the intended object of the entry, it would have to acquit the Respondent. Van Teamer v. State, infra, addressed this very question and resolved it in the Petitioner's favor. The Van Teamer decision is well reasoned and should be adopted by this Court. The decisions, State v. Waters, infra and Bennett v. State, infra and the reasoning on which they rest do not address the factual situation presented by this Record and are therefore not persuasive.

ISSUE III

The Respondent elected to be sentenced under the guidelines. The Court imposed sentenced enhancing the presumptive sentence indicated by the guidelines finding the Respondent to be a hazard to the public. Using the sexual battery as the primary offense at sentencing was appropriate because the guidelines in effect at the time of sentencing treated the burglary and sexual battery as crimes of equal magnitude. And, this called for using the score sheet for the lowest numbered category, in this case, the one for the sexual battery. The record does not support the Respondent's assertion and the arguments predicated on it that the circuit court ruled the Respondent to be a habitual offender.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED TO THE PREJUDICE OF THE STATE IN VACATING FIRST-DEGREE CONVICTION OCCASIONED BY THE RESPONDENT'S ASSAULT OR BATTERY ON THE VICTIM BECAUSE IT OCCURRED DURING THE SAME CRIMINAL EPISODE AS AN IN-VOLUNTARY SEXUAL BATTERY INVOLVING THE THREATENED USE OF FORCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY?

As the Respondent has conceded this issue, the Petitioner finds no reply necessary.

ISSUE II

WHETHER IT IS REVERSIBLE ERROR FOR A TRIAL COURT TO GIVE THE STEALTHY ENTRY AS PRIMA FACIE EVIDENCE OF INTENT TO COMMIT AN OFFENSE INSTRUCTION PREDICATED ON FLA. STAT. 810.07 (1983) IN A BURGLARY PROSECUTION WHERE THE INFORMATION CHARGES A SPECIFIC OFFENSE AND WHERE THE COURT HAS ALSO INSTRUCTED THE JURY THAT IT MUST ACQUIT THE DEFENDANT IF THE STATE'S PROOF FAILS TO ESTABLISH THE SPECIFIC OFFENSES CHARGED IN THE BURGLARY COUNT?

Under this point, the Respondent contends that he is entitled to a new trial on the burglary charge because the State had charged specific crimes in the alternative as the object of the breaking or entering and then asked for and received the instruction contemplated by Fla. Stat. § 810.07 (1983) (establishing stealthy entry without consent as prima facie evidence of intent to commit an offense). He reasons from the decision in Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983) construing this Court's decision in State v. Waters, 436 So.2d 66 (Fla. 1983). The argument is without merit. Neither the decisions nor the reasoning on which they rest compel a reversal here. The Appellant's argument does not address the question presented by

the facts of this case. The Fifth District did have occasion to address the question presented by the facts of this case in Van Teamer v. State, 417 So.2d 1129 (Fla. 5th DCA 1982). The Van Teamer decision is sound and this Court should adopt it in disposing of the Appellant's argument under this point.

In Van Teamer, the Court had occasion to consider the question presented by the facts of this case, whether it is reversible error to give the instruction predicted on Section 810.07, Fla. Stat. (1983) to the jury in a burglary case where the State has charged a specific offense and the evidence is sufficient to prove the specific offense charged in the information. In analyzing the question, the Court observed that the trial court had instructed the jury that if the State's proof of the offense charged as the object of the burglary failed, it would have to return a verdict of not guilty. That is exactly what occurred in this case and that is why Van Teamer is so instructive in the resolution of this case. After considering and distinguishing cases not specifically addressing the issue, the Court noted that there was evidence of stealthy entry and evidence to support the intent charged that there was no error in the Court's giving instruction about the inference that could arise

from the circumstances contemplated by Section 810.07, Fla. Stat. (1983).

The decision in Van Teamer is persuasive here. There are no meaningful distinctions between the factual pattern presented in that case and the factual pattern presented in this case. During the charge conference, trial counsel for the Appellant told the Court during a discussion of the meaning of State v. Waters, 436 So.2d 66 (Fla. 1983), "We are not dealing with a siutation here of whether or not the Satte has set forth a prima facie case." (R. 411 - 412). The Court agreed during the charge conference to instruct the jury that if the State failed in its proof of the offense charged as the object of the burglary, that the jury must find the defendant not guilty. (R. 412). It took the instruction from the Florida Standard Jury Instructions. (R. 412). Here, as in Van Teamer, the Court did instruct the jury that even if an unlawful entry was proved but the evidence did not establish that it was done with the intent to commit either an assault or a battery, that it would have to return a verdict of not guilty. (R. 433). And, again here as in Van Teamer, there was evidence of both stealthy entry and the crimes charged as the object of the burglary.

Neither Bennett nor Waters addressed the set of facts presented by this record. In State v. Waters, supra, the case at

the root of the Appellant's argument under this point, the Court ruled, inter alia, that where the information charged attempted burglary with intent to commit theft, the State could not rely on the presumption afforded by Section 810.07, Fla. Stat. (1979) to carry its burden of proving the intent to commit theft it had charged in the information. There had been a bench trial in the circuit court. During the course of the trial, the State presented evidence showing that the defendant was apprehended by the victim while he was in the act of trying to break into the victim's rented room containing his personalty including a TV and stereo equipment that he had padlocked from the outside. See Waters v. State, 401 So.2d 1131 (Fla. 4th DCA 1981)(giving facts not contained in Supreme Court opinion). On appeal, Waters raised the sufficiency of the evidence to prove his intent to commit the offense charged as the object of the burglary, theft. The district court reversed finding the evidence insufficient to prove that Waters intended to commit theft. It found that the evidence was not inconsistent with intent to commit other crimes. In so ruling, it rejected the State's argument that the intent element could be supplied by the presumption afforded by Section 810.07, Fla. Stat. (1979). The Court then certified two questions to this Court as the root of

being of great public importance. The first question was whether it was necessary to allege a specific offense in a burglary prosecution. And, the second question was whether the presumption afforded by Section 810.07, Fla. Stat. (1979) was sufficient to a prima facia case of intent to commit the specific offense of theft.

In reviewing the case, this Court ruled that it was not necessary to allege a specific offense in a burglary prosecution, that the presumption afforded by the statute was not available in an attempted burglary prosecution and that the evidence against Waters was sufficient to prove his intent to commit theft because the circumstances were inconsistent with the intent to commit any other offense but theft. In specifically addressing the second question presented, this Court ruled that the statute did not provide an alternative means of alleging burglary but that it did provide a mechanism for proving the intent element of the offense. The Court did not address the question presented by the facts of this case, whether it is reversible error to give the instruction predicted on Section 810.07, Fla. Stat. (1983) to the jury in a burglary case where the State has charged a specific offense and the evidence is sufficient to prove the specific offense charged in the information.

Likewise, in Bennett v. State, supra, the Second District Court ruled that where the State had charged a burglary with the intent to commit a theft that it could not rely on the presumption afforded by Section 810.07, Fla. Stat. (1981) to prove the intent element of the charge. Finding the State's proof insufficient on the intent element, the Court reversed and ordered Bennett's discharge on the authority of Waters. The decision did not address the question presented by the facts of this case, whether it is reversible error to give the instruction predicted on Section 810.07, Fla. Stat. (1983) to the jury in a burglary case where the State has charged a specific offense and the evidence is sufficient to prove the specific offense charged in the information.

Finally, it is clear that the decision in Diez v. State, 359 So.2d 55 (Fla. 3d DCA 1978), does not support a finding of reversible error here. The Court's ruling in that case was that an instruction regarding the fact that the accused did not testify that contained the language "of passing interest" did not deprive the accused of a fair trial and there was no error. The decision does contain the following language:

> A challenged jury instruction or portion of the instruction must be considered with the whole instruction or other instructions bearing on the same subject in determining whether the law was fairly presented or whether the instruction might have misled the jury. (citation omitted)
>
> 359 So.2d at 56.

Plainly, the decision does not support the conclusion for which it is asserted in the Appellant's argument under this point, that the giving of the instruction complained of in this case constituted reversible error.

ISSUE III

DID THE TRIAL COURT AND SECOND DISTRICT COURT OF APPEALS ERR IN SENTENCING MR. FOREMAN UNDER THE GUIDELINES?

Under this point, the Appellant first argues that the trial court erred in finding that the sexual battery was the primary offense at the time of sentencing. The argument then criticizes various reasons that the State argued to the circuit court in support of a departure from the presumptive sentence indicated by the guidelines. Then, it contends that the circuit court found that the Respondent was a Habitual Offender for the purposes of Fla. Stat. § 775.084 (1983) and criticizes this finding arguing that this resulted in an improper counting of the Respondent's guidelines scoresheet.

The Respondent elected to be sentenced under the guidelines and told the Court he had discussed the election with his counsel. (R. 476). After much argument and discussion, the Court ruled that it would impose a sentence exceeding the guidelines. (R. 511). At the close of the hearing, the circuit court announced its reason for the enhancement of the presumptive sentence. The Court said, "I think he constitutes a hazard to the public and danger, and a clear danger to the public." (R. 515).

The sentencing guideline rule in effect at the time the circuit court imposed sentence in this case treated the burglary and sexual battery as crimes of equal magnitude and called for using the score sheet for the lowest numbered category, in this case the one for the sexual battery. The district court reasoned correctly that this was the correct result. And the argument offered on the Respondent's behalf does nothing more than make the bare assertion that his is wrong because the burglary was a first-degree felony punishable by life. But, that does not matter because the circuit court was restricted to looking at how the guidelines assessed the severity of the offenses for purposes of imposing an appropriate sentence. And, it reached the right result. It imposed a more severe penalty for the most factually severe crime.

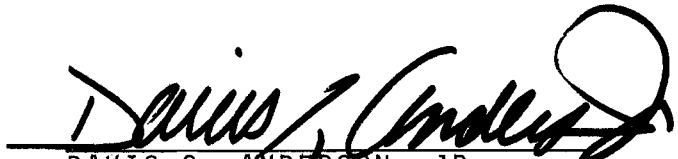
The State cannot agree that the record supports the assertion that the circuit court found the Respondent to be a Habitual Offender. The record only supports that the Assistant State Attorney made additional calculations predicated on his understanding of the working of this statute in conjunction with the guidelines. (See. R. 478, 479).

CONCLUSION

Based on the above-stated facts, arguments and authorities, the Petitioner would pray this Honorable Court reverse the decision of the district court and instruct it to reinstate the Respondent's conviction and sentence for aggravated battery.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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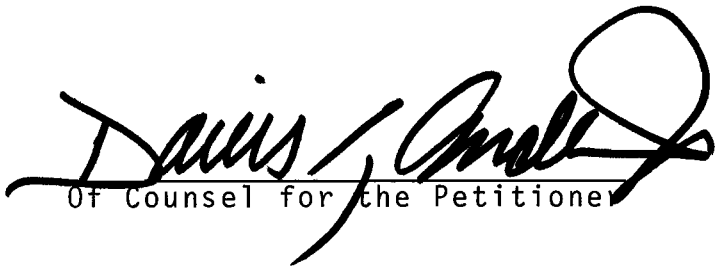
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100 - 144th Avenue, Clearwater, Florida on this 13th day of February, 1985.



Of Counsel for the Petitioner