

**FILED**

SID J. WHITE

JAN 24 1985

CLERK, SUPREME COURT

By [Signature]  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOSEPH CURTIS SMITH,

Respondent.

CASE NO. 66428

4DCA Case No. 84-326

PETITIONER'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the court below and the prosecution in the trial court. Respondent was the Appellant in the court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Petitioner unless otherwise indicated. A copy of the district court opinion is attached to this brief and designated (Appendix I).

The following symbol will be used:

"R"            Record on Appeal.

STATEMENT OF THE CASE

Respondent, Joseph Curtis Smith, was charged by Information filed August 26, 1983 with one count of burglary with assault (R 419). A jury trial was held. At the close of the State's case and the close of all evidence, Respondent moved for and renewed a Motion for Judgement of Acquittal (R 301-306). These motions were denied (R 303-306). The jury returned a verdict finding Respondent guilty of burglary with assault as charged (R 390-391, 429), and he was so adjudicated (R 394, 430-431). The lower court sentenced Respondent to twenty (20) years imprisonment with credit for one hundred fifty-six (156) days time served. This term was a departure from the sentencing guidelines (R 439-440).

Notice of Appeal was timely filed February 10, 1984 (R 442). In an opinion filed December 28, 1984 the Fourth District Court of Appeal reversed Respondent's conviction finding insufficient evidence to support it and remanded the case with direction to enter judgment for the lesser included offense of trespass.

On January 14, 1985 Petitioner/Appellee timely filed its Notice of Invocation of Discretionary Jurisdiction asserting that the district court opinion is in direct conflict with other appellate decisions. A Motion for Stay of Mandate was filed on the same date.

STATEMENT OF THE FACTS

(Limited to issue before the Court).

The incident giving rise to the case at bar involves a burglary with an assault which occurred on August 26, 1983 in Fort Lauderdale, Florida. The Information alleges that Respondent entered the dwelling or curtilage thereof located at 720 Northeast 15th Court, Fort Lauderdale, property of Rebecca Plyler with intent to commit theft therein and in the course thereof, assaulted Rebecca Plyler (R. 419) (The property actually was owned by Ms. Brayton and Ms. Plyler was a boarder).

At trial, Respondent was identified as the man who illegally entered into Ms. Plyler's room. He pointed a weeder, that looked like a fork, (R 183, 226) at her. The Respondent told her to stop screaming and directed her to place a blanket over her head. After reciting the Lord's Prayer, Ms. Plyler asked him what he wanted and he replied, "I want you" (R 184). Ms. Plyler told him that Jesus loved him, that he "didn't have to do that" and put a hand on his back. She also said if he left, everything would be o.k. She gave Respondent religious tracts and he departed (R 185-186).

The owner of the residence, a Ms. Brayton (Ms. Plyler was a boarder.) testified that the day following the incident she checked the unlocked utility room. A forked trough and utility gloves were missing though one of those

gloves was found in the hedges. (R. 240). After Ms. Brayton told the investigating detective that a weeder was missing, the detective drew a picture of the weeder. Ms. Plyler stated that it looked like the instrument used (R. 295-296). No instrument was found or introduced into evidence.

On appeal to the Fourth District Court of Appeal the conviction was reversed and the trial court directed to enter judgment for the lesser included offense of trespass. The district court found insufficient evidence of the intent of theft and further held that since the state charged a specific offense, it may not rely upon the presumption afforded by section 810.07 Florida Statutes (1981). The opinion explicitly acknowledges conflict with L.S. v. State, 446 So.2d 1148 (Fla. 3d DCA 1984).

Petitioner seeks to invoke the discretionary jurisdiction of this Court to review the decision of the district court of appeal below which expressly and directly conflicts with other decisions of this Court and of other district courts of appeal. This Court is respectfully requested to grant jurisdiction to consider and settle the law on the issue.

SUMMARY OF THE ARGUMENT

Petitioner, the State of Florida, is seeking to invoke the discretionary conflict jurisdiction of this Court because:

- a.) the opinion sub judice erroneously precludes the State from relying on the statutory presumption of Section 810.07 Florida Statutes and is in conflict with other district courts of appeal, and;
- b.) the opinion sub judice improperly reverses a jury determination that the evidence excluded all reasonable hypothesis of innocence and thus is in conflict with decisions of this Court.



REASONS FOR GRANTING THE WRIT

POINT I

THE DISTRICT COURT ERRED IN HOLDING THAT  
THE STATE COULD NOT RELY ON THE STATUTORY  
PRESUMPTION CONTAINED IN SECTION 810.07  
FLORIDA STATUTES.

The Fourth District Court of Appeal sub judice in holding that the burglary presumptive intent statute could not be relied upon when the State has charged an intent to commit a specific offense followed the logic contained in T.L.J. v State, 449 So.2d 1008 (Fla. 2d DCA 1984). However, both the third and fifth district courts of appeal have adopted the better reasoned view that the State may rely on the statutory presumption. See L.S. v. State, 446 So.2d 1148 (Fla. 3d DCA 1984) and Frederick v. State, 451 So.2d 1066 (Fla. 1984). Clearly the conflict on this issue needs to be resolved by this Court and Petitioner maintains that the logic contained in L.S. v State, supra should be adopted by this Court. (That case is presently pending before this Court, FSC Case No. 65,183, oral argument heard December 6, 1984).

POINT II

EVEN WITHOUT RELIANCE ON THE STATUTORY  
PRESUMPTION THERE WAS SUFFICIENT EVIDENCE  
TO SUPPORT THE CONVICTION.

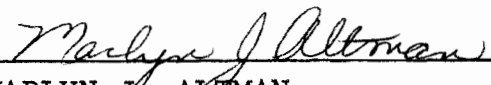
The evidence of theft in this case was admittedly circumstantial. Nonetheless, there was sufficient competent evidence presented for the jury to conclude that the item used to threaten Rebecca Plyler was the weeder identified by Vickie Brayton as missing from the utility room. (The district court erroneously thought the item taken need have been from Ms. Plyler's room, but the information charged from the entire residence and curtilage thereof.) Thus the district court reversal herein is in contravention of the rule of law set forth in Rose v. State, 425 So.2d 521, 523 (Fla. 1982) holding that the determination as to whether the evidence failed to exclude all reasonable hypothesis of innocence is for the jury to decide and should not be reversed where there is substantial, competent evidence to support the jury verdict.

CONCLUSION

Based on the foregoing presentation, supported by the authorities and circumstances cited therein, Petitioner respectfully maintains that the decision of the Fourth District Court of Appeal in the instant case is in conflict with the decisions of this Court and decisions of other district courts of appeal. Therefore, Petitioner requests that this Court issue a Writ of Certiorari and enter an order quashing the decision of the district court.

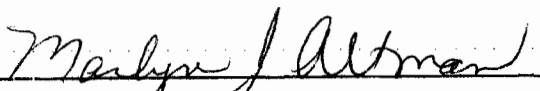
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on Jurisdiction has been furnished by mail/courier to RICHARD B. GREENE, ESQUIRE, Assistant Public Defender, and ELLEN MORRIS, ESQUIRE, Assistant Public Defender, 224 Datura Street, Harvey Building, West Palm Beach, Florida 33401 this 22nd day of January, 1985.

  
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Of Counsel