W00A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,428

THE STATE OF FLORIDA,

Petitioner,

vs.

JOSEPH CURTIS SMITH,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

INITIAL BRIEF OF PETITIONER ON THE MERITS

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AUTHORITIES CITED

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 Judgment 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. Petitioner filed its Brief on jurisdiction on January 22, 1985, and Respondent filed his Response February 4, 1985. This Honorable Court Accepted Jurisdiction, dispensing with oral argument, by its Order issued April 12, 1985.

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 Statures (1981). The opinion explicitly acknowledged conflict with L.S. v. State, 446 So.2d 1148 (Fla. 3d DCA 1984).

This Honorable Court accepted jurisdiction to review the question:

> Whether the state may attempt to establish the element of intent in a burglary prosecution by use of the presumption of intent statute, section 810.07, Florida Statutes, where the charging document alleged that the defendant entered with the intent to commit a specified offense.

This question had been answered in the affirmative by the Third District Court of Appeal when it upheld the defendant's burglary conviction in L.S. v. State, 446 So.2d 1148 (Fla. 3d DCA 1984). This Court agreed and approved the Third District Court's opinion in L.S. v. State, 10 F.L.W. 140 (Fla. Feb. 28,1985).

A copy of the L.S. v. State opinion is attached to this brief and designated Appendix II.

POINT INVOLVED

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

SUMMARY OF ARGUMENT

When the state charges that the defendant did intend to commit a specific offense after the breaking and entering, it may avail itself of section 810.07, Florida Statute, to prove the essential element of intent necessary to obtain a defendant's conviction for burglary. Therefore, it was error for the Fourth District Court of Appeal to decide otherwise and to remand the case with direction to enter judgment for the lesser included offense of trespass.

ARGUMENT

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 erred 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. This Honorable Court in its recent decision in L.S. v. State, 10 F.L.W. 140 (Fla. Feb. 28, 1985) stated:

> Our dedision in State v. Waters, 436 So.2d 66 (Fla. 1983), clearly states that an indictment or information charging burglary need not specify the offense which the defendant is alleged to have committed, although it must allege an intention to commit an offense. Thus, the exact nature of the offense alleged is, as indicated by the lower court, surplusage so long as the essential element of intent to commit an offense is alleged.

Then this Court approved the reasoning of the Third District Court of Appeal in holding that "when the state charges that the defendant did intend to commit a specific offense after the breaking and entering, it may avail itself of section 810.07." L.S. v. State, 446 So.2d 1148, 1149-50 (Fla. 3d DCA 1984). This Court, further, disapproved the reasoning of the Second District in Bennett v. State, 438 So.2d 1034 (Fla. 2d DCA 1983) to the extent it is inconsistent with the views expressed in L.S. This Court should also disapprove the opinion of the Fourth District Court of Appeal in the instant case.

Further, it is Petitioner's position that 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. Pyler's room, but the information charged from the entire residence and curtilage threrof.) 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.

The issue in the instant appeal has been answered in support of Petitioner's contentions sub judice by the Florida Supreme Court. Therefore, the decision of the Fourth District sub judice must be reversed and remanded to the Fourth District in order that Respondent's conviction for burglary with assault may be reinstated.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities cited therein, Petitioner would respectfully request this Honorable Court to disapprove the opinion of the Fourth District Court of Appeal and remand the case so that the conviction for burglary with assault may be reinstated.

Respectfully submitted,

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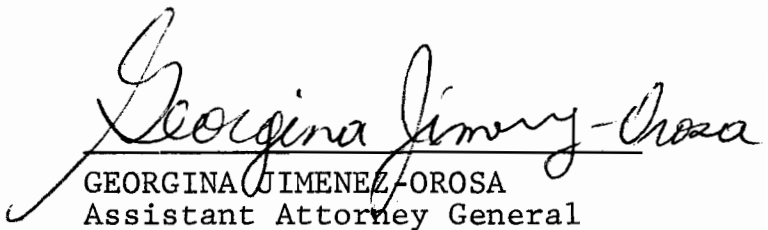

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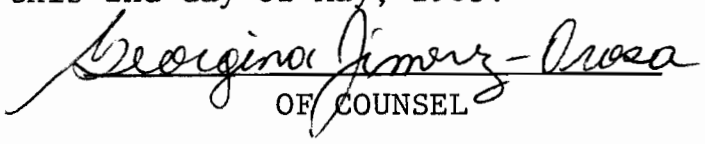
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner on the Merits has been furnished, by courier to : RICHARD B. GREENE, Esquire, Assistant Public Defender, 224 Datura Street, W. Palm Beach, FL 33401, this 2nd day of May, 1985.



OF COUNSEL