IN THE SUPREME COURT OF FLORIDA

EDWARD BEN, :

Petitioner, :

vs. :

STATE OF FLORIDA, :

Respondent. :

_____ :

Case No. 66,483
Appeal No. 84-583

PETITIONER'S BRIEF ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CITATION OF AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner, Edward Ben, was the Appellant in the Second District Court of Appeals and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeals. The appendix to this brief contains a copy of the decision rendered January 4, 1985.

SUMMARY OF ARGUMENT

Mr. Ben argues that his case conflicts with prior Florida Supreme Court decisions as to what constitutes a robbery. According to prior Supreme Court cases, violence must precede the taking in order to constitute a robbery; and force used in an escape does not constitute a robbery. The Second District Court of Appeal's opinion in Mr. Ben's case finding that force used after the taking in order to escape constitutes a robbery conflict with the existing Florida Supreme Court law.

STATEMENT OF THE CASE

On September 15, 1982, the State Attorney in and for the Sixth Judicial Circuit, Pinellas County, Florida, filed an information which it amended on the day of trial charging the Appellant, Edward Ben, with Robbery occurring on August 24, 1982, contrary to Florida Statute 812.13(2)(c). Mr. Ben was allowed to withdraw his previously entered guilty plea on December 12, 1983, and had a jury trial with the Honorable Susan Schaeffer, Circuit Judge, presiding on February 23, 1984.

On February 23, 1984, the jury deliberated and found Mr. Ben guilty as charged. On March 1, 1984, Mr. Ben was sentenced to seven years of imprisonment with credit for three hundred forty-four days served. Mr. Ben was declared a habitual offender and was sentenced in accordance with the guidelines. Mr. Ben timely filed his Notice of Appeal on March 14, 1984.

On appeal Mr. Ben attacked the sufficiency of his conviction for Robbery inasmuch as no force was used until after the taking. The Second District Court of Appeals disagreed with Mr. Ben and followed the decision of the Fifth and Third District Court of Appeals [1.] in holding that a robbery occurs if force is used in order to escape.

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1. See Royal v. State, 452 So.2d 1098 (Fla. 5th DCA 1984); and Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983). The case of Royal was recently accepted by this Honorable Court on a conflict jurisdiction basis. Royal v. State, Case No. 65,702.

STATEMENT OF THE FACTS

On August 24, 1982, Brad Holcomb was employed with Maas Brothers as a store security guard whose duties included watching out for shoplifters. Mr. Holcomb worked in an undercover capacity, wearing blue jeans and a T-shirt in order to look like a customer. On August 24, 1982, Mr. Holcomb observed Mr. Ben select several Ralph Lauren polo shirts and walk into the men's fitting room. Mr. Holcomb selected some slacks from the rack and followed Mr. Ben into the fitting room in order to observe Mr. Ben. Mr. Holcomb observed Mr. Ben stuff the T-shirts under his pants. Mr. Ben then left the dressing room with one shirt in his hand and left the store. During this time period, a female who had entered the store with Mr. Ben, waited in the men's department, glancing around the area. When both Mr. Ben and the female exited the store, Mr. Holcomb approached them, identified himself, and tried to talk with them. At this time, the female went south and Mr. Ben ran towards the west. Mr. Holcomb pursued Mr. Ben and was able to grab him. Mr. Ben then punched Mr. Holcomb in the face and continued heading west. Mr. Holcomb followed Mr. Ben again; and at this point, a man named Henry Fultz came along and assisted Mr. Holcomb in detaining Mr. Ben. Mr. Fultz blocked Mr. Ben's path so that Mr. Holcomb could catch up to Mr. Ben and detain him. Upon being tackled a second time, Mr. Ben kicked Mr. Holcomb several times.

Mr. Ben was able to break away a second time just as the female drove up in a car. Both Mr. Holcomb and Mr. Fultz grabbed Mr. Ben and prevented Mr. Ben from getting inside the car. At this time, Police Officer DeSantis drove up and the female took off. Mr. Ben was then taken into custody.

Police Officer Sahr removed the T-shirts from around the calves of both of Mr. Ben's legs, and these items were placed in an evidence locker in a back room of Maas Brothers. Officer Sahr also took into custody a pair of booster socks from around Mr. Ben's legs. Officer Sahr noted that these booster socks are used by professional shoplifters in which to stuff items and then conceal the socks with baggie pantlegs.

It was noted that seven shirts were recovered from Mr. Ben, and each shirt had a retail selling price of thirty-one dollars.

ARGUMENT

WHETHER THE DECISION IN BEN v. STATE, Case No. 84-583 (Fla. 2d DCA January 4, 1985), IS IN CONFLICT WITH THE FLORIDA SUPREME COURT AS TO WHETHER OR NOT FORCE USED AFTER A TAKING CONSTITUTES ROBBERY?

In Colby v. State, 46 Fla. 112, 35 So. 189 (1903), a pickpocket was apprehended when the would be victim felt the pickpocket's hand in his pocket and grasped the thief, holding him until the police arrived. In reversing the robbery conviction, this Court stated as follows:

> ... The evidence does not disclose such force, violence, assault, or putting in fear as is contemplated by the statute, but merely an attempt to furtively abstract [sic] from the pocket of Bousman money or other valuables supposed to be contained therein. This might constitute an attempt to commit larceny, but not robbery. Where one stealthily filches loose property from the pocket of another, and no more force is used as such as may be necessary to remove the property from the pocket, it is not robbery under the statute, but larceny. (Citations omitted)....
>
> From the evidence it appears that after Bousman became aware that defendant's hand was in his pocket, he caught the defendant by the arms, calling upon Davidson and a policeman for assistance, and that a struggle ensued, in which the parties clinched. If the defendant struggled or clinched with Bousman in effort to overpower him for the purpose of enabling him to secure

> the money from the pocket, there would be such force as the statute contemplates, but the force used merely in an effort to escape from the grasp of Bousman or to avoid arrest would not be such force as contemplated by the statute.. We think the testimony shows clearly that the tussling or clinching spoken of by the witnesses occurred in an effort to escape from Bousman and to avoid arrest, and not in an effort to secure the property. The testimony does not, therefore, support the conviction for an attempt to rob. ...

Colby, supra at 190 (Emphasis added).

In Montsdoca v. State, 84 Fla. 82, 93 So. 157 at 159 (1922), this Honorable Court stated:

> [T]he distinction between larceny and robbery is a nice one. The criteria which distinguishes these offenses is the violence which precedes the taking. There can be no robbery without violence, and there can be no larceny with it. It is violence that makes robbery an offense or greater atrocity than larceny. Robbery may thus be said to be a compound larceny composed of the crime of larceny from the person with aggravation of force, actual or constructive, used in the taking. (Emphasis added.)

The material facts in the instant case are virtually indistinguishable from those set forth in Colby, supra. Mr. Ben had already obtained the merchandise and only used force in order to escape from Mr. Holcomb. In fact, Mr. Ben and Mr. Holcomb were fifty yards from Maas Brothers when Mr. Holcomb first tackled Mr. Ben. There was no force used in obtaining the property, but force was used in an effort to escape. Under the

principles enunciated in Colby, supra, and Montsdoca, supra, Mr. Ben should not have been convicted of robbery.

It is clear that express and direct conflict exists between Ben, supra, Colby, supra, and Montsdoca, supra. This court should exercise that discretion and review the instant case not only because the case is wrong, but because a disturbing trend in the law is not emerging. Cf., Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983)(J. Baskin, dissenting), Andre v. State, 431 So.2d 1042 (Fla. 5th DCA 1983). The nice distinction between larceny and robbery is becoming blurred by disregard of established principles of law. Petitioner draws this Honorable Court's attention to the excellent dissenting opinions of Judge Cowart in Royal, supra, and Judge Baskin in Stufflebean, supra.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner has demonstrated that conflict does exist with the instant decision and the Florida Supreme Court so as to invoke discretionary review of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert J. Landry, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Edward Ben, Inmate No. 054411, Brooksville Road Prison, P.O. Box 548, Brooksville, FL 34298, February 5, 1985.

Respectfully submitted,

Deborah K. Brueckheimer