

IN THE SUPREME COURT OF FLORIDA

EDWARD BEN,

Petitioner,

v.

Case No. 66,483

STATE OF FLORIDA,

Respondent.

PETITION FOR DISCRETIONARY REVIEW
OF THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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Counsel for Respondent

FILED

SID J. WHITE

FEB 28 1985

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STATEMENT OF THE CASE AND FACTS

The facts of the case are adequately recited at page 2 of the slip opinion of the District Court of Appeal decision.

"Appellant was observed by Holcomb, a Maas Brothers security guard as he selected several shirts and took them into the men's fitting room. Holcomb followed the appellant into the fitting room and observed him stuff the shirts under his pants. The appellant then left the store with a woman companion. Holcomb approached them, identified himself, and tried to talk with them. At this time, the woman went south and the appellant ran west. Holcomb pursued and grabbed appellant, who punched Holcomb in the face and continued west. Holcomb again pursued and caught the appellant. Upon being tackled a second time, the appellant kicked Holcomb several times. Appellant was then caught by a police officer in the parking lot as he tried to get into a car driven by his woman companion."

The appellate court affirmed, holding that Ben's motion for judgment of acquittal was properly denied.

ISSUE

WHETHER THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL CONFLICTS WITH THIS COURT'S DECISION IN COLBY V. STATE, 46 Fla. 112, 35 So. 189 (1903).

ARGUMENT

The District Court of Appeal distinguished the instant case from earlier Colby ruling on the basis of the change in statute; the present statute provides that an:

". . . act shall be deemed in the course of committing the robbery if it occurs in an attempt to commit robbery or in flight after the attempt or commission."
F. S. §812.13(3) (1891)

Quite apart from the lower court's reliance on the change in statute, the Second District's decision still is in conformity to Colby. Colby reasoned:

"If the defendant struggled or clinched with Bousman in an effort to overpower him for the purpose of enabling him to secure the money in 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 is contemplated by the statute."

46 Fla. at 114, 35 So. 190

Colby thus permits a robbery conviction where the struggle is an effort to overpower the custodian for the purpose of securing the goods but not merely to effectuate an escape. The Second District concluded at slip opinion page 4:

". . . appellant used force against the security guard after the taking but while he was trying to escape with the goods from the store parking lot."

(emphasis supplied)

Thus, since Ben was utilizing force to obtain or retain another's property, a robbery conviction must obtain.

There is no conflict among decisions. The petition should be denied.

CONCLUSION

Based upon the foregoing reasons, argument and authorities, the petition should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

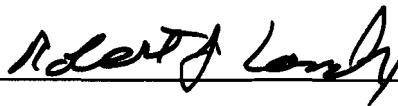


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100 144th Avenue, North, Clearwater, Florida 33520 on this 26th day of February, 1985.



Of Counsel for Respondent