0017

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DANIEL BOYNTON,

Respondent.

CASE NO. 66,971

FILED
SID J. WHITE
JUL 1 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

FILED
SID J. WHITE
JUL 15 1985
CLERK, SUPREME COURT
By Chief Deputy Clerk

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"RB"	Respondent's Answer Brief

STATEMENT OF THE CASE AND FACTS

At the hearing held on Respondent's motion to represent himself (R. 1-24, RB 3), the assistant public defender, Thomas Mahoney, stated that there had been two attorneys on Respondent's case prior to him (R. 4) and not that Respondent's case ". . . had been passed around from attorney to attorney in the public defender's office before landing in [his] lap . . . ." (RB 3). He stated that he was prepared to go to trial and that all discovery had been completed (R. 4). Mr. Mahoney stated that he had spoken with Respondent on three occasions relative to the case (R. 6) and not that ". . . he had seen Respondent only three times about all three cases" (RB 3). The trial court pointed out to Respondent that it appeared that the public defender's office had done everything they could to prepare for the case (R. 7). It explained to Respondent his options (R. 7-8) but did not "threaten" Respondent (AB 3) with anything. The trial court told Respondent of his right to represent himself (R. 9-10) and also told him why it was a matter for serious consideration (R. 10-12). It then suggested to Respondent that being represented by the public defender was the best course for him, but that the choice was his (R. 12). A police sergeant told the trial court that Respondent had trial clothes there (R. 13). After a half-hour recess, Respondent decided to represent himself (R. 13). The trial court asked Respondent if he understood the pitfalls

and dangers of self-representation that it had previously explained to him (R. 13) and repeated some of them (R. 14-15) when Respondent stated that he understood some of it (R. 13). The trial court appointed Mr. Mahoney to sit at counsel table with Respondent for him to consult with if he so choose (R. 15, 20). The trial court granted Respondent a continuance until the next day to read the depositions and police report and to obtain other clothes (R. 15-16, 21) since Respondent complained that the ones his attorney brought him were too big (R. 15). During the trial court's examination of Respondent (R. 17-20, RB 3), Respondent stated that he had completed eighth grade (R. 17) and <u>not</u> that he had ". . . dropped out of the eighth grade . . . ." (RB 3). The trial court explained the seriousness of the charge to Respondent and Respondent stated that his attorney had told him (R. 19).

The next morning, the trial court refused to grant Respondent another continuance (RB 4) since Respondent had the five short depositions to read for six hours the day before (R. 32-33). Mr. Mahoney stated, in regards to Respondent's subpeona of a witness question (RB 5), that the witness was relevant to Appellant's last case but not to this case (R. 36).

When the trial court told Respondent that he could either proceed with the clothes that were available to him or stay in the blue uniform he had on, Respondent stated that he would rather go in as he was (R. 38). When an assistant public defender (RB 6) told Respondent that he would look fine in

the available clothes, Respondent again stated he would rather go in just as he was (R. 38).

During trial, Respondent cross-examined the victim's son, Liam Price (R. 129-130). He also cross-examined Sergeant Gary Leach (R. 156-157) and Officer William Fraser (R. 162-163). Respondent also objected to the admission of a state exhibit into evidence (R. 155). Respondent requested two jury instructions which the trial court agreed to give (R. 239-240) and made a closing argument (R. 242). Respondent also requested that the jury be polled after it had brought back its verdict of guilt (R. 267).

Officer Fraser (R. 158; RB 11) testified that when Appellant was found in the garage (RB 11) he was crouching down behind a piece of plywood, concealing himself (R. 161).

Sergeant Parkinson (R. 167; RB 11) testified that the shoeprint in the sand under the victim's bathroom window (RB 11) measured approximately four inches across the ball of the shoe and that Respondent's shoe also measured approximately four inches across the ball of the shoe (R. 177).

Kathleen Price (R. 130; RB 10) testified that her missing purse contained about fifteen dollars (R. 132) and Sergeant Leach (R. 148; RB 10) testified that he obtained sixteen dollars from Respondent when he was apprehended (R. 156).

Officer Wigglesworth (R. 203) testified that Respondent did not want to make any local calls from the holding cell (R. 204) (in attempting to contact his witness) (RB 12).

POINTS INVOLVED

POINT I

WHETHER IT IS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO INCLUDE A SEPARATE WRITTEN STATEMENT OF REASONS FOR DEPARTURE FROM THE GUIDELINES WHERE THE TRIAL COURT HAS STATED SUCH REASONS FOR DEPARTURE AT THE TIME OF SENTENCING AND SUCH REASONS ARE TRANSCRIBED AND MADE A PART OF THE RECORD?

POINT II

WHETHER THE TRIAL COURT PROPERLY ALLOWED RESPONDENT HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WHERE RESPONDENT HAD CLEARLY EXPRESSED THE DESIRE TO DO SO AND WHERE THE TRIAL COURT HELD AN INQUIRY TO DETERMINE WHETHER RESPONDENT'S WAIVER OF COUNSEL WAS INTELLIGENTLY AND VOLUNTARILY MADE?

POINT III

WHETHER THE TRIAL COURT PROPERLY ALLOWED RESPONDENT TO PROCEED TO TRIAL IN THE BLUE UNIFORM THAT HAD BEEN PROVIDED TO HIM WHERE RESPONDENT REFUSED OTHER CLOTHES THAT WERE AVAILABLE TO HIM AND EXPRESSED THE DESIRE TO GO AHEAD JUST AS HE WAS?

POINT IV

WHETHER THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE PETITIONER PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THE CHARGE?

SUMMARY OF THE ARGUMENT

POINT II

The trial court properly allowed Respondent his constitutional right to represent himself since Respondent had clearly expressed his desire to do so. Respondent was advised by the trial court, of the dangers and pitfalls of self-representation and Respondent stated that he understood the seriousness of the case. Therefore Respondent's decision to represent himself came as a result of an intelligent and voluntary waiver of counsel and should not be set aside because Respondent is now displeased with the results.

POINT III

Respondent had trial clothes available and Respondent was granted a continuance to obtain still other clothing. Respondent refused this available clothing and decided to go ahead just as he was despite an assistant public defender's statement that he looked fine in the available clothes. Therefore the trial court's action allowing a respondent to proceed to trial in the blue uniform was proper.

POINT IV

Respondent's intent to commit the theft may be properly presumed by proof of his stealthy entry into the premises. In any event Respondent made no specific contention as to this point in his bare bones motion for judgment of acquittal.

ARGUMENT

POINT I

IT IS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO INCLUDE A SEPARATE WRITTEN STATEMENT OF REASONS FOR DEPARTURE FROM THE GUIDELINES WHERE THE TRIAL COURT HAS STATED SUCH REASONS FOR DEPARTURE AT THE TIME OF SENTENCING AND SUCH REASONS ARE TRANSCRIBED AND MADE A PART OF THE RECORD.

Petitioner relies upon argument made in his initial brief.

POINT II

THE TRIAL COURT PROPERLY ALLOWED RESPONDENT HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF WHERE RESPONDENT HAD CLEARLY EXPRESSED THE DESIRE TO DO SO AND WHERE THE TRIAL COURT HELD AN INQUIRY TO DETERMINE WHETHER RESPONDENT'S WAIVER OF COUNSEL WAS INTELLIGENTLY AND VOLUNTARILY MADE.

Respondent alleges that the trial court erred by compelling him to proceed pro se where he wished to be represented by counsel.

Petitioner maintains Respondent's allegations are unsupported by the record but that a review of the record clearly shows that the trial court properly allowed Respondent his constitutional right to represent himself since Respondent had clearly expressed the desire to do so (R. 13). State v. Cappetta, 216 So.2d 749, 750 (Fla. 1968); Bentley v. State, 415 So.2d 849, 850 (Fla. 4th DCA 1982). This is obviously not a case such as Keene v. State, 420 So.2d 908 (Fla. 1st DCA 1982), cited by Respondent (RB 16), since there the appellant never asserted that he wished to represent himself. Id. 15 910.

After Respondent's request to represent himself (R. 13), the trial court, as it was required to do, Id. at 910, advised Respondent of the dangers and pitfalls of self-representation (R. 13-15); see also, R. 9-11). Respondent stated that he understood the seriousness of the case (R. 19).

The trial court completed its requirements by inquiring as to such factors as Respondent's age and education (R. 17-18) and by determining that Respondent's decision to represent himself was intelligently made (R. 18-19). Robinson v. State, 368 So.2d 674, 675 (Fla. 1st DCA 1979); Mitchell v. State, 407 So.2d 1005, 1006 (Fla. 5th DCA 1981).

The record shows that the trial court appointed assistant public defender Mahoney to sit at counsel table with Respondent and to advise him if Respondent wished (R. 15, 20); that the trial court granted Respondent a continuance to prepare for trial (R. 15-16, 21); that Respondent's witness was not relevant to this case (R. 36); that Respondent cross-examined certain state witnesses (R. 129, 156, 162); that Respondent objected to the admission of a state's exhibit into evidence (R. 155); that Respondent requested two jury instructions which the trial court agreed to give (R. 239-240); that Respondent made a closing argument (R. 242); and that Respondent requested the polling of the jury (R. 267). Petitioner maintains that these facts all go to show that Respondent had the ability to adequately represent himself and indeed did so. Baranko v. State, 406 So.2d 1271-1272 (Fla. 1st DCA 1981).

Petitioner further maintains that Respondent's claims that he later wanted to be represented by someone other than Mr. Mahoney (AB 5-8, 16) are irrelevant since

Respondent may not abuse the dignity of the court and frustrate its orderly proceedings by refusing appointed counsel, demanding the right to have another attorney represent him, and then, failing that, choosing to represent himself and professing incompetence for self-representation. Wilder v. State, 156 So.2d 395, 397 (Fla. 1st DCA 1963); Hammond v. State, 264 So.2d 463, 465 (Fla. 4th DCA 1972); Mansfield v. State, 430 So.2d 586, 588 (Fla. 4th DCA 1983); Jones v. State, ___ So.2d ___, Case No. 62, 424, Op. filed March 29, 1984 (Fla. 1984) [9 FLW 113, 114-115].

In conclusion, Petitioner maintains Respondent's decision to represent himself, as was his right, and his intelligent and voluntary waiver of counsel, should not now be set aside because Respondent is displeased with results which would have attained in any event. The aforementioned facts show that the trial court was correct in allowing Respondent to conduct his own defense and Respondent's conviction must therefore be affirmed.

POINT III

THE TRIAL COURT PROPERLY ALLOWED RESPONDENT TO PROCEED TO TRIAL IN THE BLUE UNIFORM THAT HAD BEEN PROVIDED TO HIM WHERE RESPONDENT REFUSED OTHER CLOTHES THAT WERE AVAILABLE TO HIM AND EXPRESSED THE DESIRE TO GO AHEAD JUST AS HE WAS.

Respondent alleges that the trial court erred by compelling him to proceed to trial in jail clothes (RB 19).

Petitioner maintains that such a contention is totally unsupported by the record and thus wholly without merit. The record clearly shows that Respondent had trial clothes available (R. 13), that Respondent was granted a continuance to obtain still other clothes (R. 15-16, 21), and that Respondent refused this available clothing and decided to go ahead just as he was, despite an assistant public defender's statement that he would look fine in the available clothes (R. 38). Under such circumstances, it can hardly be said that the trial court's action allowing Respondent to proceed to trial in the blue uniform that had been provided to him was anything but proper. Topley v. State, 424 So.2d 424 So.2d 81, 82 (Fla. 4th DCA 1982); Mansfield v. State, 430 So.2d at 588-589.

POINT IV

THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE PETITIONER PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THE CHARGE.

Respondent alleges the trial court erred by denying his motions for judgment of acquittal since Petitioner failed to show his intent to commit theft (RB 23).

Petitioner initially maintains that as Respondent's motions for judgment of acquittal made no such specific contention (R. 186, 237), Respondent has waived this issue for appellate review. Daley v. State, 374 So.2d 59 (Fla. 3d DCA 1979). Respondent's bare bones motions for judgment of acquittal did not raise this particular allegedly insufficient evidence claim. DeLaCova v. State, 355 So.2d 1227 (Fla. 3d DCA 1978).

Petitioner further maintains even should this Honorable Court determine that his contention is properly before it, that Respondent is still not entitled to relief since Petitioner was entitled to a presumption of Respondent's intent by proof of Respondent's stealthy entry into the premises (R. 117, 112, 134-135). L.S. v. State, 446 So.2d 1148, 1149-1150 (Fla. 3d DCA 1984).

In conclusion, Petitioner maintains that the trial court properly denied Respondent's motions for judgment of acquittal in any event since it presented sufficient

evidence of Respondent's intent to commit theft. Respondent was present at the scene of the crime about the time of its commission (R. 117, 122) and evidence to that effect is admissible in a trial at which he is charged with that offense. Francis v. State, 58 So.2d 872 (Fla. 1952). Upon being discovered there (R. 116-117), Respondent assaulted the victim (R. 118-119) and fled from the scene of the crime (R. 119, 126-127) which justified an inference by the jury that he was implicated therein. Palmer v. State, 106 Fla. 237, 143 So. 126, reh. den. 145 So. 29 (1932). The victim's daughter, Kathleen Price, testified that her missing purse contained about fifteen dollars (R. 132) and Sergeant Leach testified that he obtained sixteen dollars from Respondent when he was apprehended (R. 156, and Respondent was found attempting to conceal himself in a garage, crouching down behind a piece of plywood (R. 161).

In light of this evidence of intent, the trial court properly denied Respondent's motions for judgment of acquittal since:

> . . . a defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law.

Matrascia v. State, 349 So.2d 735, 736 (Fla. 3d DCA 1977).

The jury having reasonably concluded Respondent's guilt and viewing the facts in evidence and drawing every conclusion therefrom favorable to the Petitioner requires this Honorable Court to reject Respondent's contention that the trial court erred in denying his motions for judgment of acquittal. Rodriguez v. State, 413 So.2d 1303, 1305 (Fla. 3d DCA 1982).

The question of intent was one of fact to be decided by the jury from all of the circumstances, Jones v. State, 192 So.2d 285, 286-287 (Fla. 3d DCA 1966), and the test to be applied on review of a denial of a judgment of acquittal is not simply whether in the opinion of this Honorable Court "the evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude." Greene v. State, 408 So.2d 1086, 1089 (Fla. 4th DCA 1982). Petitioner maintains that, in light of the evidence presented in the case sub judice, it is clear that the jury acted reasonably in concluding that the proof offered was inconsistent with a reasonable hypothesis of innocence and that it excluded every reasonable hypothesis but that of guilt. State v. Waters, 426 So.2d 66 (Fla. 1983); State v. Evans, 394 So.2d 1068, 1069 (Fla. 4th DCA 1981). Respondent's conviction must be affirmed.

CONCLUSION

For all the reasons and authorities cited herein, the Fourth District's decision should be reversed, as to Point I, and affirmed as to the remaining points on appeal.

Respectfully submitted,

JIM SMITH
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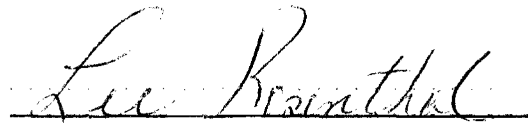

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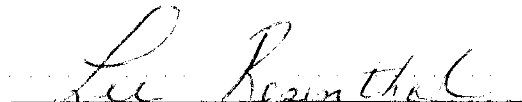
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: GARY CALDWELL, Assistant Public Defender, 224 Datura Street, West Palm Beach, Florida 33401, this 28th day of June, 1985.



Of Counsel