

IN THE SUPREME COURT OF FLORIDA

CASE NO.

70 276

DITRICT COURT OF APPEAL, THIRD DISTRICT, CASE NO. 85-931

DAVID WILLIAMS,

MAR 30 1987

Petitioner,

CLERK, SUPREME COURT

vs.

By: Deputy Clerk

STATE OF FLORIDA,

Respondent.

---

ON PETITION FOR DISCRETIONARY REVIEW

---

BRIEF OF PETITIONER ON JURISDICTION

GITLITZ, KEEGAN & DITTMAR, P.A.  
Suite 807, Biscayne Building  
19 West Flagler Street  
Miami, Florida 33130  
(305) 374-1600

By: JAMES D. KEEGAN  
Special Assistant Public Defender

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	ii
INTRODUCTION . . . . .	1
STATEMENT OF THE CASE AND FACTS . . . . .	2
QUESTION PRESENTED . . . . .	4
SUMMARY OF THE ARGUMENT . . . . .	5
ARGUMENT . . . . .	6
THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, IN THE INSTANT CAUSE, IS IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, IN <u>STATE v.</u> <u>PILCHER</u> , 443 SO.2d 366 (Fla. 5th DCA 1983).	
CONCLUSION . . . . .	10
CERTIFICATE OF SERVICE . . . . .	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>State v. Pilcher</u> , 443 So.2d 366 (Fla. 5th DCA 1983) . . . . .	1, 4, 5, 6, 7, 8, 9
<u>Wilson v. State</u> , 438 So.2d 108 (Fla. 1st DCA 1983) . . . . .	7, 8
 <u>STATUTES AND RULES:</u>	
Florida Statutes § 775.087(2)(a) . . . . .	2, 3, 5, 6, 7,
Florida Statutes § 790.01 . . . . .	2
Florida Statutes § 810.02 . . . . .	2
Florida Statutes § 812.014 . . . . .	2

## INTRODUCTION

The parties hereto shall be referred to as they were in the Trial Court or by name. All emphasis is added, unless otherwise noted. The Opinion of the District Court of Appeal, Third District, which is challenged herein, is contained in Part A of the Appendix filed by the Petitione in connection with the instant Brief. A copy of the Opinion in State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983), the decision which is in direct and express conflict with the Opinion sought to be reviewed, is contained in Part B of said Appendix.

STATEMENT OF THE CASE AND FACTS

On March 29, 1984, the Defendant was charged by Information filed in the Trial Court with Burglary Of A Structure While Armed Or Thereafter Arming Himself With A Dangerous Weapon, To Wit: A Rifle, in violation of Florida Statutes § 810.02; Grand Theft In the Second Degree, in violation of Florida Statutes § 812.014; and Carrying A Concealed Firearm, To Wit: A Pistol, in violation of Florida Statutes § 790.01.

The Defendant was found inside a pawn shop by the police after having gained entry by breaking through the ceiling. At the time he was found, the Defendant was hiding behind a television set, underneath the entry point in the ceiling. Within arms reach of where the Defendant was found were certain weapons, including a loaded rifle, which had been taken from elsewhere in the pawn shop. The owner of the pawn shop testified that he kept the weapons loaded.

After trial by jury, the Defendant was found guilty of Burglary Of A Structure While Armed Or Thereafter Arming Himself With A Dangerous Weapon as well as Grand Theft. However, as to the Concealed Firearms charge, he was acquitted.

At sentencing, the Trial Court indicated that, based upon the Defendant's record, he would have placed the Defendant on probation, but that under Florida Statutes § 775.087(2)(A) the

Trial Court was required to impose a mandatory minimum sentence of three (3) years incarceration, which the Court entered.

An appeal was taken to the District Court of Appeal for the Third District attacking the entry of the mandatory minimum sentence under the referenced Statute. However, in the decision dated February 24, 1987, a true and correct copy of which is contained in Appendix A, the Court of Appeal affirmed the sentence, holding:

Therefore, we find that, although a burglary may be completed for purposes of prosecution, it is not complete for all other purposes until the defendant reaches safety, and a defendant's crime may be aggravated and his sentence may be enhanced based upon acts committed up until that point. 1/

1/§ 775.087(2)(A) must be construed according to its plain meaning. (Citations omitted) Though our holding puts us in direct conflict with the fifth district's Decision in Pilcher, we believe that it comports with the plain meaning of the statute.

Appendix A, p. 4

From the referenced opinion, a timely Notice To Invoke Discretionary Review was filed.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, IN THE INSTANT CAUSE, IS IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, IN STATE v. PILCHER, 443 SO.2d 366 (FLA. 5TH DCA 1983)?

SUMMARY OF ARGUMENT

The Opinion in the Decision sought to be reviewed expressly acknowledges that it is in conflict with the Fifth District Court of Appeal's Decision in State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983).

Although, as the Third District Court of Appeal stated in its challenged Opinion, burglary is not completed, for all purposes, once a person enters a structure with the requisite intent to commit an offense, the offense is completed for purposes of the mandatory minimum sentencing provisions of Florida Statutes § 775.087(2)(a). The theft of a firearm or the attempted theft of same, whether it be loaded or not, without more, is insufficient to invoke the referenced Statute.



ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, IN THE INSTANT CAUSE, IS IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT, IN STATE v. PILCHER, 443 SO.2d 366 (FLA. 5TH DCA 1983).

Florida Statutes § 775.087(2)(a) provides, in relevant portion, as follows:

Any person who is convicted of:  
Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any intent to commit the aforementioned crimes, . . . and who had in his possession a "firearm" as defined in s. 790.001(6) . . . shall be sentenced to a minimum term of imprisonment of 3 calendar years . . .

In State v. Pilcher, supra, a true and correct copy of which is contained in Appendix B, the District Court of Appeal, noting the distinction between an armed burglary conviction, which would be justified when an individual, during the course of a burglary, steals a weapon, unequivocally held that the provisions of Florida Statutes § 775.087(2) do not contemplate application to a situation where a weapon is stolen. As that Court held:

in order to fall within the mandatory minimum statute the defendant must have had the gun in his possession when he committed the burglary. A burglary is committed and is complete when the entering upon the

premises occurs. If a person enters, or remains in, a structure with intent to commit an offense, then the crime has occurred. (Citations omitted).

443 So.2d at 367.

As discussed supra, the District Court of Appeal's Opinion in the instant case expressly acknowledges its conflict with State v. Pilcher, but, in false reliance upon cases involving armed burglary, concludes that the statute in question does cover a situation where an individual steals or attempts to steal a firearm during the course of a burglary.

It is respectfully submitted that the plain provisions of Florida Statutes 775.087(2), which recites that it is applicable only to an individual convicted of a crime who had in his possession a firearm as well as the policy sought to be implemented by the enactment of the referenced Statute, clearly indicate that the rule of law announced in the Pilcher case is the correct one, as opposed to that announced by the District Court of Appeals for the Third District in the case under review.

In addition to Pilcher, in the Opinion under review the District Court cites the case of Wilson v. State, 438 So.2d 108 (Fla. 1st DCA 1983), in support of its holding. The Wilson Court, however, similar to the Pilcher Court, refused to permit the imposition of a mandatory three (3) year sentence under circumstances where the State established only that the Defendant stole a gun during the course of a burglary. In the

case at bar, the District Court attempts to distinguish Wilson by pointing out that the facts in Wilson showed only that a weapon was taken during the burglary and that the First District impliedly held that, had the weapon which was stolen after the entry been loaded, or had the Defendant possessed both the stolen gun and the ammunition, he would have been in possession of a firearm during the burglary, which would have made him susceptible to the three (3) year mandatory minimum sentence. We would submit, however, that this interpretation is incorrect and, in any event, inapplicable to the facts of the case at bar. In this case, the evidence is undisputed that the weapon found within reach of the Defendant was taken from another location in the pawn shop and brought to the place where the Defendant ultimately hoped to gain exit. The evidence also reflects that the weapon was loaded by the owner of the pawn shop. There is absolutely no evidence that the Defendant exercised dominion and control over the weapon in any fashion other than for the purpose of stealing it. It was not used to threaten any of the officers or in any way to further his escape or flight. It was merely moved from one point in the premises to another in an attempt to facilitate its taking. Accordingly, none of the rationale recited in Wilson v. State are applicable.

The District Court of Appeal, Third District, in its Opinion, expressly concedes that a conflict exists between its

decision and State v. Pilcher. Appendix A, P. 4, fn 1. This conflict should be resolved.

CONCLUSION

Based upon the foregoing facts, authorities and argument,  
this Court should accept jurisdiction in the instant cause.

Respectfully submitted,

GITLITZ, KEEGAN & DITTMAR, P.A.  
Suite 807, Biscayne Building  
19 West Flagler Street  
Miami, Florida 33130  
(305) 374-1600

By: 


JAMES D. KEEGAN  
Special Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Charles M. Fahlbusch, Esq., Assistant Attorney General, Office of the Attorney General, 401 N.W. Second Avenue, Suite 802, Miami, Florida 33128 this 26 day of March, 1987.

Respectfully submitted,

GITLITZ, KEEGAN & DITTMAR, P.A.  
Suite 807, Biscayne Building  
19 West Flagler Street  
Miami, Florida 33130  
(305) 374-1600

By:   
JAMES D. KEEGAN  
Special Assistant Public Defender

Br. of Pet.  
on  
Juris

---