

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,276

DAVID WILLIAMS,

Petitioner,

CLERK
By: Deputy Clerk

THE STATE OF FLORIDA,

Respondent.

* * * * *

ON PETITION FOR DISCRETIONARY REVIEW

* * * * *

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

CHARLES M FAHLBUSCH
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the court below. The Petitioner, DAVID WILLIAMS, was the defendant in the trial court and the appellant in the court below. The symbol "App." and the exhibit letter assigned by Petitioner will be used to refer to the Appendix to Petitioner's Brief. The parties will be identified, in this brief, as they stand before this court. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts, although generally true and correct, contains certain material omissions which are corrected below as a condition of Respondent's acceptance thereof:

The Petitioner, in addition to the loaded rifle and shotgun that he was stealing from the pawn shop (Petitioner's Brief, 2) was also found in possession of a pistol which did not belong to anyone connected with the pawn shop, according to the arresting officer. (App., Exh. A,2).

ISSUE PRESENTED FOR REVIEW

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IS NOT IN DIRECT AND EXPRESS CONFLICT WITH THE OPINION OF THE FIFTH DISTRICT, IN STATE V. PILCHER, 443 So.2d 366 (Fla. 5th DCA 1983)? (Restated).

SUMMARY OF THE ARGUMENT

The opinion sought to be reviewed does expressly acknowledge that it is in conflict with State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983)(App., Exh. A,4).

However, the reasoning of the Third District's opinion, which is supported by substantial authority, is so clearly superior to that of Pilcher that this court should consider affirmance on the Jurisdictional Briefs, alone.

ARGUMENT

THE OPINION OF THE THIRD DISTRICT
COURT OF APPEAL IS NOT IN EXPRESS
AND DIRECT CONFLICT WITH THE
OPINION OF THE FIFTH DISTRICT, IN
STATE V. PILCHER, 443 So.2d 366
(Fla. 5th DCA 1983). (Restated).

This court could find, based upon the fact that a pistol was found on the Petitioner, which did not belong to anyone connected to the pawn shop, that this case is distinguishable from the Pilcher case. (App., Exh. A,2). However, the District Court, deliberately, did not reach this issue (App., Exh. A,4-5), since it preferred to conflict with the faulty reasoning of Pilcher.

Indeed, to do otherwise, as pointed out in the opinion, would leave Florida courts with the contradictory positions of ruling that crimes committed while in the burglarized structure are committed during the course of the burglary, while holding that a burglar who arms himself while in the burglarized structure is not armed during the course of the burglary. Mills v. State, 476 So.2d 172 (Fla. 1985); cert. denied, 106 S.Ct. 1241 (1986); Brown v. State, 473 So.2d 1260 (Fla. 1985); cert. denied, 106 S.Ct. 607 (1985).

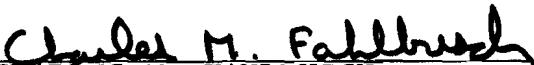
Therefore, the opinion of the Third District is, even on its face, so far superior and more reasonable than the opinion of the Fifth District in Pilcher that this court should seriously consider affirmance on the jurisdictional briefs, alone.

CONCLUSION

Based upon the foregoing reasoning and authorities, the opinion of the Third District Court of Appeals should clearly be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



CHARLES M. FAHLBUSCH
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to JAMES D. KEEGAN, Special Assistant Public Defender, Suite 807, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 on this 15th day of April, 1987.



CHARLES M. FAHLBUSCH
Assistant Attorney General

CMF/ia