

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,276

DAVID WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

SEP 12 1987
SUPREME COURT
Dep. Clerk

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Petitioner would rely upon the Statement Of The Case And Facts contained in his Initial Brief On The Merits previously filed herein.

SUMMARY OF THE ARGUMENT

In his Reply Brief, the Petitioner addresses only two of the Arguments raised by the State in its Brief On The Merits. First, the State's assertion that the rule of law relief upon by the Petitioner as set forth in State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983), would lead to absurd results, is incorrect. Contrary to the State's assertion, that rule is applicable in situations where unlawful entry plays a part of a burglary, as in the case at bar, as well as those situations in which the burglary is committed without unlawful entry into the premises. In both situations, the crime of burglary is completed either when the unlawful entry occurs or when the perpetrator unlawfully remains in the structure with the intent to commit the criminal offense. In either case, in order for a defendant to be subject to the mandatory minimum provisions of the subject statute, he must possess the weapon prior to the completion of the burglary.

The State's assertion that mandatory minimum sentence imposed is sustainable by virtue of testimony elicited at trial alleging the Defendant's possession of a third firearm, a hand gun, is completely misplaced. The Record clearly reflects that the Defendant was acquitted of this crime and the record is equally clear that the Trial Court imposed the mandatory sentence predicated upon the Defendant's convictions under the count of the information alleging involvement with the rifle. Even if

this were not the case, a trial court's sentence cannot be predicated upon facts not sustained by a jury verdict.

ARGUMENT

THE TRIAL COURT ERRED IN IMPOSING A MANDATORY MINIMUM SENTENCE PURSUANT TO FLORIDA STATUTES, SECTION 775.087(2), WHERE THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT THE DEFENDANT POSSESSED A FIREARM WHEN HE COMMITTED THE BURGLARY FOR WHICH HE WAS CHARGED AND CONVICTED.

The Petitioner would rely primarily on his Initial Brief On The Merits, but wishes to reply to two of the arguments raised by the State in its Brief On The Merits. These arguments are, first, that the holding in State v. Pilcher, supra, leads to absurd results and, second, that even if the holding in Pilcher is correct, there was sufficient evidence to sustain the challenged application of Florida Statutes, Section 775.087(2) by virtue of testimony regarding the Defendant's possession of a hand gun. Both of these State arguments are devoid of merit.

The State argues that illegal entry is unnecessary for a finding of burglary where a defendant illegally remains in a structure. Thus, such a defendant, who steals a firearm, is obviously in possession of a weapon and therefore would be properly sentenced under the minimum mandatory provisions. This, according to the State, leads to the absurd result of allowing the use of the mandatory minimum sentencing provisions only in situations where illegal entry has not occurred. This analysis is fallacious because the rationale of the Pilcher decision would apply equally in situations where there was an unlawful entry as well as where the burglary was committed by the unlawful

remaining in a structure. Under the Pilcher analysis, the burglary is completed after the unlawful entry or, in the latter situation, after the unlawful remaining in. If a defendant attempts to steal a firearm after he has unlawfully remained in a structure, the mandatory minimum provision should not apply, whereas it would apply if the accused had armed himself prior to his unlawful remaining in the premises. For example, the mandatory minimum provisions would be fully applicable where a defendant stole a weapon in a department store prior to closing time while he was still lawfully on the premises. Thus, the so called absurd result envisioned by the State with the application of the Pilcher rule is illusory.

The second argument addressed herein begins at Page 14 of the State's Brief. The State argues that the testimony of a police officer elicited during trial, that he uncovered a handgun in the Defendant's pocket after his arrest, was sufficient to justify the imposition of the mandatory sentence in question. This argument is patently falacious. The Defendant was charged in a three-count information. Count I charged Burglary Of A Structure and alleged that the Defendant was armed or did arm himself with a dangerous weapon, to wit: a rifle, in violation of Florida Statutes 819.02. R. 1. Count II alleged Grand Theft In The Second Degree, in violation of Florida Statutes, Section 812.014. R. 2. Count III alleged that the Defendant carried a concealed firearm, to wit: a pistol, in violation of Florida Statutes, Section 790.01. The Jury rendered a verdict finding

the Defendant guilty on Counts I and II, R. 14-15, and not guilty as to Count III, R. 16. The Trial Court entered a Judgment finding the Defendant guilty as to Counts I and II, Burglary and Grand Theft, R. 18, and a Judgment Of Acquittal as to Count III, R. 17. The mandatory minimum sentence imposed pursuant to Florida Statutes, Section 775.087(2), the issue in controversy in this proceeding, was imposed pursuant to the Defendant's conviction as to Count I of the information. R. 20. Further, the Record unequivocally reflects that the Trial Court, in imposing the mandatory minimum sentence, did so in contemplation of the Defendant's involvement with the rifle or shotgun and not the hand gun as is now asserted by the State. R.V.II. 10.

There is therefore absolutely no question that the basis of the imposition of the challenged sentence is predicated, not upon the hand-gun purportedly found in the Defendant's possession, for which the Defendant was acquitted, but because of his purported possession of the rifle, the subject of an attempted larceny. Even if the Record in this cause were not as clear as it is, a sentence under Florida Statutes, Section 775.087(2) would not be sustainabale. Because of the Jury's verdict aquiting the Defendant of the hand gun charge, the Trial Court could not have used the hand gun allegations to sustain the challenged sentence. A jury's verdict which does not contain sufficient findings to enable a trial court to render a judgment cannot support such a judgment and it will not stand. Streeter_v._State, 416 So.2d

1203, 1206 (Fla. 3d DCA 1982). To permit a trial court to predicate an enhanced sentence or mandatory minimum sentence, as sought herein by the State, upon facts not found by a jury is an invasion of a jury's function and results in a miscarriage of justice and a violation of due process. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). The imposition of the mandatory minimum sentence predicated upon the Defendant's alleged possession of a hand gun is completely inconsistent with the Jury's verdict acquitting him of that charge and cannot stand. State v. Smith, 462 So.2d 1102 (Fla. 1985); Lopez v. State, 470 So.2d 58 (Fla. 3d DCA 1985).

CONCLUSION

Based upon the foregoing reasons, authorities and argument, the Petitioner respectfully requests that this Honorable Court reverse the Opinion of the District Court below and remand this cause with instructions that the mandatory minimum provisions of Florida Statutes, Section 775.087(2) are inapplicable to the instant cause and that the Petitioner be granted such other and further relief as is appropriate under the circumstance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 31st day of August, 1987, to: Charles M. Fahlbusch, Esq., Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128.

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