IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,779

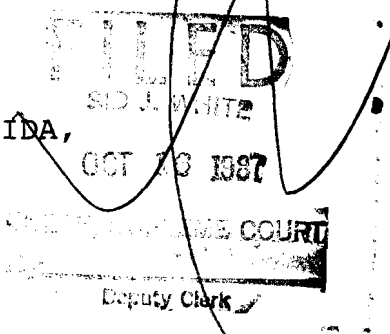
K. C., a juvenile,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

INTRODUCTION

Petitioner, K.C., a juvenile, was the appellant in the district court of appeal and the respondent in the Circuit Court. Respondent, the State of Florida, was the appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the symbol "R" will be used to designate the record on appeal and the symbol "TR" will be used to designate the transcripts of testimony. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

On April 24, 1985 a petition for delinquency was filed charging respondent, K.C., with petit theft in violation of section 812.014(1)(2)(c), Florida Statutes (1983), and two counts of resisting a merchant in violation of section 812.015(6), Florida Statutes (1983) (R. 1-2). An adjudicatory hearing on these charges was held on June 28, 1985 (R. 6; TR. 1-75). Counsel for respondent moved for a judgment of acquittal at the close of the state's case and renewed the motion at the close of all the evidence (TR. 52-57, 65-69). The Court denied the motion on both occasions, and found that respondent had committed the acts alleged in the petition for delinquency (R. 6; TR. 57, 69). Respondent was thereupon adjudicated to be delinquent (R. 6; TR. 69). On July 18, 1985 the Court placed respondent in a program of community control under several conditions (R. 7).

Notice of appeal to the District Court of Appeal, Third District, was filed July 26, 1985 (R. 8). That court affirmed the adjudication of delinquency for petit theft, finding that the evidence presented at the adjudicatory hearing was legally sufficient to support that adjudication, and affirmed the adjudications for resisting a merchant, finding that section 812.015(6) did not preclude the bringing of a charge of resisting a merchant until after a conviction for petit theft had been obtained. K.C. v. State, 507 So.2d 769 (Fla. 3d DCA 1987).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the district court of appeal was filed on June 22, 1987. This Court accepted

jurisdiction of the case on September 15, 1987.

STATEMENT OF THE FACTS

K.C. was charged with taking merchandise from a Winn-Dixie grocery store and resisting the efforts of two employees of that store to recover the merchandise. Those two employees, Charles Fox and Michael Carrier, testified for the state at the adjudicatory hearing along with another store employee, Maureen Rathburn, and a police officer, Catherine Sours. Respondent testified on his own behalf at the hearing.

Ms. Rathburn, the store's deli manager, testified that she observed K.C. and another juvenile standing about 6-8 feet away from a candy counter (TR. 5). After a few minutes, she observed that a tote bag which K.C. had on his shoulder "came to the front between the two boys." (TR. 6). Ms. Rathburn did not see either boy put anything into the tote bag, but according to her testimony she did see K.C.'s hand "zip the bag" (TR. 6-7, 10). Some time thereafter, the two boys walked very quickly down the aisle (TR. 7, 10). When Rathburn called out to the store manager, the boys started running (TR. 7, 12).

Charles Fox, a bag boy at the store, testified that he had observed the two boys when they first entered the store (TR. 14-15). Fox observed that K.C. had a red gym bag on his shoulder as he entered the store (TR. 15). The two boys walked over to the aisle where the candy was located, and Fox lost sight of them (TR. 16).

The next time Fox saw the boys they were running out of the store (TR. 16-17). The boy with K.C. was carrying the gym bag as the two boys left the store (TR. 25). Fox left the store and ran

after the boys (TR. 18). During the chase that followed, K.C. was running in front of the other boy (TR. 20). When the other boy tried to climb over a wall, he dropped the gym bag he had been carrying (TR. 19). Fox eventually caught both boys and took them back to the Winn-Dixie store (TR. 22). Afterwards, he went back to the area where the gym bag had been dropped (TR. 22-23). When he opened the bag he observed books and packages of candy (TR. 23).

Michael Carrier, the store manager at the Winn-Dixie, was at the service counter when the two boys walked by him (TR. 31-33). After speaking to Ms. Rathburn, Carrier walked outside the store and saw the two boys walking quickly down the street (TR. 35-36). When Carrier yelled out for the boys to stop, they turned and looked at him and then started running away (TR. 36). Carrier tried to follow the boys, but he eventually lost sight of them (TR. 38). When Carrier returned to the store, Charles Fox was there with the two boys (TR. 38).

Officer Catherine Sours of the Coral Gables Police Department testified that she was called to the Winn-Dixie store after the two boys had been returned to the store (TR. 42-43). Officer Sours took custody of the red gym bag and observed packages of candy inside that bag (TR. 44).

K.C. testified that he entered the Winn-Dixie before school with Eric Diaz (TR. 58). When they got to the candy section, Diaz told K.C. to get Diaz's wallet out of the bag that K.C. was carrying for him (TR. 59, 61). When K.C. opened the bag, Diaz started putting candy into it (TR. 59). At that point, K.C.

stated, "Hey, what's going on? Put the candy back." (TR. 59). Diaz responded, "No, we won't get caught." (TR. 59, 62). K.C. then droped the bag on the floor and started walking away (TR. 59, 62). Diaz picked up the bag, zipped it closed, and walked away behind K.C. (TR. 59). K.C. testified that he never put any candy in the bag (TR. 59). He further stated that he never knew that anyone was chasing him after he left the store (TR. 63). He testified that he ran away because he was scared and did not want to be caught for something he did not do (TR. 60).

SUMMARY OF ARGUMENT

The requirement of a subsequent finding of guilt of theft of the subject merchandise is set forth in the very clause in section 812.015(6), Florida Statutes (1983) which defines the offense of resisting a merchant, and therefore such a finding constitutes an essential element of that offense. Two consequences necessarily follow from this fact. First, an information charging the offense of resisting a merchant must allege that the accused was subsequently found guilty of theft of the subject merchandise. Second, to withstand a motion for judgment of acquittal at the close of the state's case in a prosecution for resisting a merchant, evidence must be introduced that the accused was subsequently found to be guilty of theft of the subject merchandise. Obviously, a charging document cannot allege, and evidence cannot be presented at trial, of something which has not yet occurred. Accordingly, the First and Fifth District Courts of Appeal have correctly held that an individual cannot be charged with the offense of resisting a merchant until he has been found guilty of theft of the subject merchandise.

This result fully comports with the legislative intent behind section 812.015. That statute attempts to strike a balance between a merchant's need for protection from the crime of shoplifting and the customer's legitimate interest in being free from groundless accusations of a crime. Just as the original provisions of the statute sought to protect the customer from false accusations of the crime of shoplifting, so too the provisions of section 812.015(6) which were subsequently added to

the statute seek to protect the customer from false accusations of the crime of resisting a merchant. The holdings of the First and Fifth District Courts of Appeal that an individual cannot be charged with the offense of resisting a merchant until there has been a finding of guilt on the theft charge fully effectuate these purposes behind the statute.

ARGUMENT

THE CLEAR AND UNEQUIVOCAL LANGUAGE OF SECTION 812.015(6), FLORIDA STATUTES (1983) ESTABLISHES THAT AN ESSENTIAL ELEMENT OF THE OFFENSE OF RESISTING A MERCHANT IS THAT THE ACCUSED BE SUBSEQUENTLY FOUND TO BE GUILTY OF THEFT OF THE SUBJECT MERCHANDISE, AND AS A RESULT A FINDING OF GUILT ON THE THEFT CHARGE IS REQUIRED BEFORE AN INDIVIDUAL CAN BE CHARGED WITH RESISTING A MERCHANT.

Section 812.015(6), Florida Statutes (1983) defines the offense of resisting a merchant as follows:

> An individual who resists the reasonable effort of a ... merchant to recover the property which the ... merchant ... had probable cause to believe the individual had concealed or removed from its place of display or elsewhere and who is subsequently found to be guilty of theft of the subject merchandise[1] is guilty of a misdemeanor of the first degree ... unless the individual did not know, or did not have reason to know, that the person seeking to recover the merchandise ... was a ... merchant ...

The First District Court of Appeal, in In the Interest of W.L.B., 502 So.2d 50 (Fla. 1st DCA 1987) and In the Interest of J.L.P., 490 So.2d 85 (Fla. 1st DCA 1986), and the Fifth District Court of Appeal, in K.M.S. v. State, 402 So.2d 593 (Fla. 5th DCA 1981), have held that the foregoing statutory language establishes that an essential element of the offense of resisting a merchant is that the accused be subsequently found to be guilty of theft of the subject merchandise, and that as a result an individual cannot be charged with the offense of resisting a merchant until there has been a finding of guilt on the theft charge. In the

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[1] Laws 1986, c. 86-161, § 2, eff. July 1, 1986, substituted references to "property" for "merchandise".

present case, however, the Third District Court of Appeal held that section 812.015(6) did not preclude the bringing of a charge of resisting a merchant until after there had been a finding of guilt on the theft charge. K.C. v. State, 507 So.2d 769 (Fla. 3d DCA 1987). Petitioner submits that the clear and unequivocal language of section 812.015(6), as well as the legislative intent behind that statute, mandates approval by this Court of the conclusion reached by the First and Fifth District Courts of Appeal.

There can be little doubt that under section 812.015(6) an essential element of the offense of resisting a merchant is that the accused be subsequently found guilty of the theft of the subject merchandise. The requirement of a subsequent finding of guilt of theft is set forth in the very clause which defines the crime of resisting a merchant, along with the requirements that 1) the individual resist the effort of a merchant to recover merchandise; 2) the merchant's effort to recover the merchandise be reasonable; and 3) the merchant have probable cause to believe that the individual has concealed or removed the merchandise from its place of display or elsewhere. As such, that requirement constitutes an essential element of the crime. On the other hand, the exemption in the statute for individuals who do not know or have reason to know that the person seeking to recover the merchandise is a merchant does not constitute an essential element of the crime, because that exemption is not contained in the enacting clause of the statute. See, Hicks v. State, 421 So.2d 510 (Fla. 1982); State v. Thompson, 390 So.2d 715 (Fla.

1980); Baeumel v. State, 26 Fla. 71, 7 So. 371 (1890).

In establishing a conviction for a different offense as an essential element of the offense of resisting a merchant, section 812.015(6) can be compared to section 790.23, Florida Statutes (1987) which defines the offense of possession of a firearm by a convicted felon as follows:

> It is unlawful for any person who has been convicted of a felony in the courts of this state...to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

Pursuant to this statutory definition, a prior conviction is a substantive element of the crime of possession of a firearm by a convicted felon. State v. Vazquez, 419 So.2d 1088 (Fla. 1982); State v. Davis, 203 So.2d 160 (Fla. 1967).

As this Court noted in Davis, supra, this type of statute is not to be confused with a recidivist statute which simply increases the penalty for an offense based on a defendant's prior convictions:

> "The fact that the alleged recidivist has committed a previous felony is not determinative of his guilt or innocence of the later offense. The state must prove the elements of the subsequent crime without regard to the first offense. The fact that there was a former offense becomes relevant only in determining the degree of the punishment that the recidivist must suffer...
>
> Davis was charged with possession of a pistol after he had been convicted of a felony. This crime cannot be committed unless the individual charged is an ex-felon. His prior conviction is a substantive element of the crime charged. Its relevancy is not restricted solely to a determination of the extent of sentence to be served as it would be in a true recidivist proceeding. Davis was

> simply charged with committing a crime, albeit an essential element was proof of commission of a prior felony."

203 So.2d at 162 (citations omitted).

Thus, in statutes such as section 316.193(2), Florida Statutes (1987) (increasing the penalty for driving while intoxicated based on the number of prior convictions for that offense), section 877.08(4), Florida Statutes (1987) (increasing the penalty for tampering with a vending machine or parking meter based on a prior conviction for that offense), and section 812.014(2)(c), Florida Statutes (1987) (increasing the penalty for petit theft based on the number of prior convictions for that offense), a conviction for another offense is not an essential element of the crime defined by the statute. However, in statutes such as section 790.23 and section 812.015(6), a conviction for another criminal offense is an essential element of the offense defined by the statute. Accordingly, the First District Court of Appeal in W.L.B., supra, and J.L.P., supra, and the Fifth District Court of Appeal in K.M.S., supra, properly held that a subsequent conviction for theft of the subject merchandise is an essential element of the offense of resisting a merchant.

Two consequences necessarily follow from the fact that a subsequent finding of guilt of theft of the subject merchandise is an essential element of the offense of resisting a merchant. First, an information charging that offense must allege that the accused was subsequently found to be guilty of the theft of the subject merchandise. This is because where an information wholly

omits to allege an essential element of an offense, the information is void as failing to charge a crime. State v. Gray, 435 So.2d 816 (Fla. 1983); State v. Dye, 346 So.2d 538 (Fla. 1977); State v. Fields, 390 So.2d 128 (Fla. 4th DCA 1980). Thus, the Fifth District Court of Appeal properly held in K.M.S., supra, that a motion to dismiss a count charging resisting a merchant should have been granted because without an allegation that the accused was subsequently found guilty of theft, the count failed to charge a crime.

Second, to withstand a motion for judgment of acquittal at the close of the state's case in a prosecution for resisting a merchant, evidence must be introduced that the accused was subsequently found to be guilty of the theft of the subject merchandise. This is so because to withstand a defendant's motion for judgment of acquittal, the state must introduce as to each element of an offense sufficient evidence to sustain a guilty verdict. Downer v. State, 375 So.2d 840 (Fla. 1979); Pittman v. State, 47 So.2d 691 (Fla. 1950); Cunningham v. State, 385 So.2d 721 (Fla. 3d DCA 1980), rev. denied, 402 So.2d 613 (Fla. 1981); Weinshenker v. State, 223 So.2d 561 (Fla. 3d DCA 1969), cert. denied, 396 U.S.973, 90 S. Ct. 462, 24 L.Ed.2d 441 (1969). Accordingly, in the present case, as the state had not established in its case-in-chief that K.C. had been found guilty of petit theft of the subject merchandise (and indeed could not have established this fact because K.C. had been charged in the same charging document with petit theft and resisting a merchant), the trial judge should have granted K.C.'s motion for

judgment of acquittal at the close of the state's case.

As an information charging resisting a merchant must allege that the accused was subsequently found to be guilty of theft of the subject merchandise, and as evidence of such a subsequent finding of guilt is required to withstand a motion for judgment of acquittal at trial, it is clear that a person cannot be charged with resisting a merchant until he has been found guilty of theft of the subject merchandise. Obviously, a charging document cannot allege, and evidence cannot be presented at trial, of something which has not yet occurred. Therefore, the First and the Fifth District Courts of Appeal have quite properly held that an individual cannot be charged with the offense of resisting a merchant until he has been found to be guilty of theft of the subject merchandise.

This result fully comports with the legislative intent behind section 812.015. A special rule of construction for section 812.015 is prescribed by section 812.037, Florida Statutes (1987):

> Notwithstanding s. 775.021, ss. 812.012-812.037 shall not be construed strictly or liberally, but shall be construed in light of their purposes to achieve their remedial goals.

The purposes behind section 812.015 can best be discerned by reviewing the legislative history of that statute.

Section 812.015 has its roots in Ch. 29668, Laws of Fla. (1955). That statute set forth the arrest procedures for larceny of goods held for sale, and established exemptions from civil or criminal liability for such an arrest when there was probable

cause for arresting a person for that offense. The purpose behind the statute was to ameliorate the shopkeeper's dilemma under the common law which provided that he had the right to take action in defense of his property, including force or confinement reasonable under the circumstances, but which also provided that if the suspicion of theft proved to be erroneous, the detention was per se unreasonable and not warranted by the circumstances. See, State v. Jones, 461 So.2d 97 (Fla. 1984). By requiring probable cause for detention, the statute attempted to strike "a balance between a merchant's need for protection from the crime of shoplifting and the customer's legitimate interest in being free from groundless shoplifting accusations." Morris v. Albertson's, Inc., 705 F.2d 406, 410 (11th Cir. 1983). It is important to note that the concern of the legislature was not just a protection of the customer from being falsely convicted of shoplifting; the concern was protecting the customer from even being accused of shoplifting.

In 1975, the legislature, by chapter 75-144, added the provision which is now found in section 812.015(6). When viewed in the context of the provisions to which it was added, it is apparent that section 812.015(6) represents an attempt to strike the same type of balance between the rights of the shopkeeper and those of the customer as was struck in the prior provisions. The rights of the shopkeeper are protected by the imposition of a criminal penalty for resisting the reasonable efforts of the shopkeeper to recover his merchandise. On the other hand, to protect the customer from false accusations of the crime of

resisting a merchant, section 812.015 makes a subsequent finding of guilt of theft of the subject merchandise an essential element of the offense, thereby ensuring that a customer will not have to face a charge of resisting a merchant until he has been found guilty of theft of the subject merchandise. Thus, just as the legislature was concerned in Ch. 29688 with protecting a customer from false accusations of the crime of shoplifting, so too the legislature was concerned in what is now section 812.015(6) with protecting the customer from false accusations of resisting a merchant. The holdings of the First and Fifth District Courts of Appeal that an individual cannot be charged with the offense of resisting a merchant until there has been a finding of guilt on the theft charge fully effectuate these purposes behind the statute.

The fact that an individual cannot be simultaneously charged and tried for the offenses of theft and resisting merchant may well cause the state some degree of inconvenience. Two separate charging documents must be filed, and two separate trials or adjudicatory hearings must be held.[2] However, as this result is dictated by the express language of section 812.015(6), and is

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[2] It should be noted that no speedy trial problems are created by requiring the state to wait until there has been a finding of guilt of theft before commencing a prosecution for resisting a merchant. As the First District Court of Appeal correctly recognized in W.L.B., supra, the offense of resisting a merchant is incomplete until such time as there is a finding of guilt of theft, and therefore the speedy trial time period for the offense of resisting a merchant cannot begin to run until such time as there is a finding of guilt of theft. The state would thus have the full speedy trial time period to bring the defendant to trial on the charge of resisting a merchant.

fully consistent with the legislative intent behind that statute, the state will have to suffer that inconvenience. As this Court has repeatedly recognized:

> "It is not the province of this Court to rewrite the acts of the Legislature. Relief against the restrictive provisions must necessarily come from the legislative rather than from the judicial branch of the government."

State v. City of Fort Pierce, 88 So.2d 135, 137 (Fla. 1956). See also, Dade County v. National Bulk Carriers, Inc., 450 So.2d 213 (Fla. 1984); Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981); State v. Elder, 382 So.2d 687 (Fla. 1980); Brown v. State, 358 So.2d 16 (Fla. 1978); Stern v. Miller, 348 So.2d 303 (Fla. 1977).

As the clear and unequivocal language of section 812.015(6) establishes that an individual cannot be charged with the offense of resisting a merchant until there has been a finding of guilt of theft of the subject merchandise, and as such a requirement fully comports with the purpose of that statute to protect customers from false accusations of resisting a merchant, this Court is required to enforce that statute notwithstanding the inconvenience to the state that may result. By enacting section 812.015(6), the legislature has apparently decided that the goal of protecting customers from false accusations of the offense of resisting a merchant justifies whatever inconvenience is caused to the state by requiring it to obtain a finding of guilt of theft before bringing a charge of resisting a merchant. Accordingly, this Court should approve the holdings of the First and Fifth District Courts of Appeal that an individual cannot be

charged with the offense of resisting a merchant until there has been a finding of guilt on the theft charge, and quash the decision of the Third District Court of Appeal in the present case insofar as it holds to the contrary.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse petitioner's adjudications of delinquency for resisting a merchant.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 13th day of October, 1987.

HOWARD K. BLUMBERG
Assistant Public Defender