

IN THE SUPREME COURT OF FLORIDA



AUG 14 1987

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RODNEY THOMAS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 70,975
4th DCA No. 4-86-0800

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150

JEFFREY L. ANDERSON
Assistant Public Defender

Counsel for Petitioner.

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PRELIMINARY STATEMENT

The Petitioner was the appellee in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellant and the prosecution in the respective lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The symbol "A" will be used to refer to the appendix which is the decision of the district court of appeal.

STATEMENT OF THE CASE AND FACTS

The district court's decision shows that Petitioner was apprehended at 12:30 a.m., after being discovered in a frequently-burglarized neighborhood from which he fled by jumping a fence (A1). Petitioner was found in possession of a screwdriver and with both hands covered by socks (A2). Petitioner made a statement to police that he had earlier entered the development from which he was seen leaving for the purpose of committing a burglary, but alleged that he was arrested before being able to perpetrate the crime (A2).¹

In the trial court Petitioner filed a motion to dismiss pursuant to Rule 3.190(c)(4) (A6-8). In the trial court Petitioner posited that because the tool in his possession was a common household item², which was not actually used in a burglary, he could not be convicted of possession of burglary tools. The trial court granted Petitioner's motion to dismiss (A1,9). Respondent appealed the trial court's order.

On June 10, 1987, the Fourth District Court of Appeal reversed the order of the trial court (A1). On June 23, 1987, Petitioner filed a motion for rehearing. On July 15, 1987, the

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It should be noted that the district court's recitation of these facts is from the probable cause affidavit which was filed (A5). No testimony was presented at the motion hearing. In the affidavit the police did not state that Petitioner alleged that he was going to commit a crime, rather the police stated that Petitioner alleged that he did not commit any burglary (A5).

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A screwdriver - Foster v. State, 286 So.2d 549,551 (Fla. 1973); Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979).

Fourth District Court of Appeal denied Petitioner's motion for rehearing (A4). On August 6, 1987, Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

By finding that the offense of possession of burglary tools, where the tool possessed is a common household tool, may be established by circumstantial evidence without evidence of actual use of the tool in a burglary, the district court's decision conflicts with K.W. v. State, 468 So.2d 368 (Fla. 2d DCA 1985) and Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979), which hold that circumstantial evidence is insufficient and it is necessary for the prosecution to present evidence of the tools actual use in a burglary.

ARGUMENT

POINT INVOLVED

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF ANOTHER DISTRICT COURT OF APPEAL.

Petitioner invokes this Court's "conflict" jurisdiction under Article V, § 3(b)(3), Florida Constitution (1980), and Fla.R.App.P. 9.030(a)(2)(iv). Article V, § 3(b)(3) provides that review may be sought of decisions of district courts of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

Conflict jurisdiction is properly invoked when a district court of appeal either (1) announces a rule of law which conflicts with a rule previously announced by the Supreme Court or another district; or (2) applies a rule of law to produce a different result in a case which involves substantially the same facts as another case; or (3) misapplies precedent. Mancini v. State, 312 So.2d 732 (Fla. 1975); Acensio v. State, 497 So.2d 640 (Fla. 1986); McBurnette v. Playground Equipment Corp., 137 So.2d 563 (Fla. 1962).

In the present case the Fourth District Court of Appeal held that the offense of possession of burglary tools, where the tool possessed is a common household tool, can be established by circumstantial evidence (A2-3). In its decision the district court rejected Petitioner's argument that the intent to use a common household item as a burglary tool can be established only

by evidence that it was actually used to commit, or in the attempt to commit, a burglary (A2-3). The district court's decision conflicts with K.W. v. State, 468 So.2d 368 (Fla. 2d DCA 1985) and Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979).

In K.W. v. State, 468 So.2d 368 (Fla. 2d DCA 1985) the Second District Court of Appeal held that the intent to use a common household tool in a burglary, which is required to establish possession of burglary tools, could only be proven by the item's actual use in a burglary or attempted burglary:

The items found on K.W. are household tools or tools of everyday use. Since they are not contraband per se, it is only the possession of such implements along with a criminal intent or usage that constitutes a punishable offense. As we noted in Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979), cert. denied, 383 So.2d 1203 (Fla. 1980), in such instances it is necessary for the state to present evidence of an item's actual use in burglary or attempted burglary to establish the requisite criminal intent. See also James v. State, 452 So.2d 1048 (Fla. 2d DCA 1984); Hubbell v. State, 446 So.2d 175 (Fla. 5th DCA), petition for review denied, 453 So.2d 44 (Fla. 1984); Frame v. State, 388 So.2d 1381 (Fla. 2d DCA); appeal dismissed, 394 So.2d 1152 (Fla. 1980); Crosby v. State, 352 So.2d 1247 (Fla. 2d DCA 1977).

468 So.2d at 369 (emphasis added).³

The instant case is in conflict with K.W..

In Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979), the defendant was charged with possessing burglary tools. In reviewing the denial of the defendant's Rule 3.190(c)(4) motion, the district court had to determine whether the jury could have

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It should be noted that K.W. is a fairly recent case, i.e. a 1985 case.

concluded the defendant possessed common household items with the intent to use them in a burglary. Preston v. State, supra at 452.

In Preston the defendant argued that since the items were common household items they could not be considered burglary tools in absence of evidence that they were in fact used in a burglary. Preston, supra at 453. The State argued that an intent to use the items to commit a burglary could be found from the circumstances surrounding their possession. Preston, supra at 453. The Second District Court of Appeal recognized that one could be found guilty if there is an intent to use the item as a burglary tool, but rejected the State's position and held that such intent could only be found from evidence that the item was in fact used as a burglary tool and reversed the defendant's conviction for possession of burglary tools.⁴ Id.

In addition, it should be noted that the factual circumstances surrounding the possession of the tool in Preston was almost identical to the circumstances in the present case. In Preston the defendant was observed by police officers crouching behind a bush sometime between 2:00 and 3:00 o'clock a.m. Preston, supra at 452. The defendant fled when he saw the officers approaching. Id. While in pursuit the officers saw the defendant hide behind a tree. Id. When the defendant stepped out from behind the tree he dropped a sock which contained a screwdriver, two ice picks, a

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The district court cited Foster v. State, 286 So.2d 549 (Fla. 1973), for this proposition and held that the proposition was still viable.

knife, and a flashlight. Id. In an ensuing interview, the defendant admitted to "night prowling." Id. Furthermore, it appeared that the defendant had given a false statement as to why he was behind a tree. Id. The circumstances of the instant case are substantially the same (A1-A2). However, the resulting decision was different because in Preston it was held that there must be actual proof that the common household item was used in a burglary.

Because the conflicts with K.W. and Preston are both direct and express this Court has jurisdiction to review the instant case. Moreover, the conflict presented is an important one. The standard jury instruction on possession of burglary tools cites Crosby v. State, 352 So.2d 1247 (Fla. 2d DCA 1977), to indicate that the classification of a common tool as a burglary tool requires proof that the item was used in a burglary and is different than the evidence required for non-common tools:

POSSESSION OF BURGLARY TOOLS
F.S. 810.06

Before you can find the defendant guilty of Possession of Burglary Tools, the State must prove the following two elements beyond a reasonable doubt:

- | | |
|-----------------------------------|--|
| Elements | 1. (Defendant) had in his possession a [tool] [machine] [implement]. |
| Give 2a if tool not a common tool | 2. a. [(Defendant) had a fully-formed, conscious intent that the [tool] [machine] [implement] would be used by him or someone else to commit a [burglary] [trespass].] |

Give 2b if common
tool; Crosby v.
State, 352 So.2d
1247

b. [The [tool] [mach-
ine [implement] was used
by (defendant) or some-
one else to commit a [bur-
glary] [trespass].]

Florida Standard Jury Instructions, (Cr. 1981),
at page 138.

Thus, the present conflict is one of importance and presents the type of inter-district conflict which can only be resolved by this Court. Therefore, this Court should accept jurisdiction of this cause and proceed to dispose of the issues after briefing on the merits by the parties.

CONCLUSION

This Court may and should review the decision of the district court of appeal in the exercise of its certiorari jurisdiction.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit
9th Floor Governmental Center
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150


JEFFREY E. ANDERSON
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to DEBORAH GULLER, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 12th day of August, 1987.


of Counsel