

IN THE SUPREME COURT OF FLORIDA

RODNEY THOMAS,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 70,975
)	
STATE OF FLORIDA,)	
)	
Respondent.)	
_____)	

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the appellee in the court below and the defendant in the trial court. Respondent was the appellant in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief and designated (Appendix).

The following symbols will be used:

"R"	Record on Appeal
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

In November of 1985 the Delray Beach Police Department established a surveillance of residential areas due to numerous burglaries in that city (R12).

On November 16, 1985, a development known as Country Manors was under police surveillance (R12). At approximately 12:32 a.m. an individual was seen jumping a fence out of the development and running from the rear of the development (R8,12). The individual was apprehended, and initially identified himself as "Larry Jenkins," but later admitted his name to be Rodney Thomas, the Petitioner (R12). Petitioner had a pair of socks covering his hands (R12). A screwdriver was also found in his possession (R12).

Petitioner was transported to the Delray Beach Police Department (R12). Petitioner indicated that he had entered the development for the purpose of committing a burglary (R12). Petitioner insisted that he did not commit a burglary that night (R12). There was no verification that Petitioner had, or had not, committed a burglary that night (R12).

On November 26, 1985, Petitioner was charged by information for I) loitering or prowling, II) obstructing or opposing an officer without violence, and III) possession of burglary tools - the screwdriver (R14). Petitioner thereafter filed a motion to dismiss the charge of possession of burglary tools pursuant to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure

(R23). Following a hearing on the motion on March 27, 1986 (R2-10), the trial court granted the motion on April 7, 1986 (R27). The state filed a notice of appeal (R26).

On June 10, 1987, the Fourth District Court of Appeal reversed the order of the trial court dismissing the possession of a burglary tool charge (A1). On June 23, 1987, Petitioner filed a motion for rehearing. On July 15, 1987, the district court denied Petitioner's motion for rehearing. Petitioner timely filed a notice to invoke this Court's discretionary jurisdiction on August 6, 1987. This Honorable Court accepted jurisdiction by its order issued on February 4, 1988.

SUMMARY OF ARGUMENT

In order to convict one for possession of burglary tools there must be proof that the item possessed was intended to facilitate a burglary. Where the item is a common household item, the mere possession of such an item, even under suspicious circumstances, is not sufficient to prove the required intent to use the item to facilitate a burglary. Without more than possession and suspicious circumstances, it would be mere speculation to conclude that the common household item was intended to be used to facilitate a burglary. In order for there to be more than mere speculation, there must be proof, direct or circumstantial, that the common household item was in fact used in a burglary. In the present case there was not evidence that the common household item was used in a burglary. In the present case there was no evidence that a burglary had been committed on the day in question. The trial court did not err in granting the motion to dismiss.

ARGUMENT
POINT INVOLVED

THE TRIAL COURT DID NOT ERR IN GRANTING THE
MOTION TO DISMISS THE CHARGE OF POSSESSION OF A
BURGLARY TOOL.

Petitioner was apprehended after leaving a development by jumping over a fence. A screwdriver was found on his person. Petitioner admitted that he had earlier intended to commit a burglary. However, Petitioner did not commit any burglary and the screwdriver had never been used for an illegal purpose (R25). These facts were not disputed by the prosecution.

The trial court properly granted the motion to dismiss based on the undisputed facts in this case. A motion to dismiss pursuant to Rule 3.190(c)(4) Florida Rules of Criminal Procedure should be used to determine whether the undisputed facts "as a matter of law, establish a prima facie case of guilt of the accused." State v. Davis, 243 So.2d 587,591 (Fla. 1971). The motion should be granted and trial avoided when "the material facts are not genuinely in issue and could legally support only one judgment." Id. (Emphasis added).¹ At bar, the facts would

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The purpose of a motion to dismiss is to avoid an unnecessary trial where the undisputed facts are incapable of supporting guilt beyond a reasonable doubt. If any of the material facts are in dispute, the motion should be denied. If the undisputed facts could not support a finding of guilt beyond a reasonable doubt, the motion should be granted. The granting of the motion does not deprive the state of its legitimate day in court. If there is additional information discovered after the granting of the motion, the state may refile a new charging document. Fla.R.Crim.P. 3.190(e). On the other hand, if the motion is improperly denied, and a later motion for judgment of acquittal granted, not only would there be an unnecessary expenditure of time and resources, the state would also be permanently barred from trying the defendant again.

not permit any reasonable juror to find Petitioner guilty of possession of burglary tools. In other words, the undisputed facts could not legally, i.e. as a matter of law, support a judgment of guilt.

The undisputed facts in this case are very similar to those in Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979). In Preston the defendant was observed crouching behind a bush sometime between 2:00 and 3:00 a.m. The defendant fled when he saw police officers approaching. While in pursuit, the officers saw the defendant hide behind a tree. When the defendant stepped out from behind the tree he dropped a sock which contained a screwdriver, two ice picks, a knife, and a flashlight. In an ensuing interview, the defendant admitted to "night prowling." Preston, supra, at 452.

In Preston the defendant, pursuant to Rule 3.190(c)(4) Fla.R.Crim.P., moved to dismiss the charge of possession of burglary tools.² The district court held that possession of items of an innocent nature was not criminal without proof that they were intended to be used in a burglary. The district court

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Both Preston and the present case involve the following statute:

810.06 Possession of burglary tools. - Whoever has in his possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

adhered this Court's reasoning in Foster v. State, 286 So.2d 549 (Fla. 1973), and further noted that such an intent cannot be discerned unless the common household item was in fact used in a burglary:

We believe the rule expressed in the Foster case is that such an intent, where the tool is a common household item, can only be found from evidence that the item was in fact used as a burglary tool. The court in Foster observed that a conviction without such evidence would amount to criminalizing the mere possession of a simple household tool.

373 So.2d 453.

The district court also indicated that while some case law indicated that the intent to use an item as a burglary tool can be proven from the surrounding circumstances, in none of the cases was such an intent discerned when the item was a common household tool - no matter how suspicious the circumstances. 373 So.2d at 454. The logic behind the district court's decision centers on the lack of any rational inference that innocent household items are intended to be used in burglaries rather than for other purposes.³

In Foster v. State, 286 So.2d 549 (Fla. 1973), this Court explained that common items, such as a screwdriver, are generally innocent items and mere possession of them under suspicious circumstances does not convert them into burglary tools:

... one cannot be convicted of possession of burglary tools, **when those tools are nothing more than a simple screwdriver**, without the use

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Such an inference is permissible with regard to an item which is not a common household item. The possession of such an item in combination with the intent to commit a burglary would allow a jury to find an intent to use the item in a burglary.

of such a tool in a burglary, breaking and entering, et cetera. To rule otherwise, would be to hold that the state has the police power to criminalize possession of a simple household tool, i.e., a screwdriver. It does not. It would be an unconstitutional act - in excess of the State's police power - to criminalize the simple possession of a screwdriver, just as much as it would be to criminalize the possession of such items as ladies' hat pins, automobile tire iron kits, et cetera, without first requiring that they first be **used** as burglary tools. An examination of the burglary tools statute reveals the **potential** for any number of common household tools to be "illegal" unless the statute is construed, in an appropriate case, such as this, to require that for such a tool to be "illegal," it must be **used** as a burglary tool - thus becoming a facet of the burglary, breaking and entering transaction, etc.

286 So.2d at 551.

Again, the district court in Preston, supra, also expressed the thought that items are not merely criminalized by the circumstances surrounding their possession. 373 So.2d at 455. In the present case the Fourth District disagreed with the reasoning in Foster and Preston and held that intent to use a common household item as a burglary tool may be inferred from the surrounding circumstances. However, such an analysis by a trier of fact would be nothing more than pure speculation, rather than a rational conclusion which is capable of supporting a guilty verdict.

The trial court also recognized that the possession of a common item, such as a screwdriver, does not mean that the item is criminal contraband:

THE COURT: That's the problem in any of these cases. People can walk around with a penknife or a screwdriver or a hammer hanging down from the little -- the holder in their overall trouser leg or something like that, and it's

certainly no crime to be walking around with that kind of stuff in your possession.

The cases seem to say that you have to have a nexus between the possession of that particular type of article and a crime in which it was used in some manner or it was obvious that it would be used in some manner; and the cases are strict because -- and they should be strict because somebody could be convicted of a felony because they're walking around with a screwdriver in their pocket, and that's a pretty serious situation to face.

(R7-8).

Section 810.06, Fla.Stat. was never designed to pyramid felony convictions merely because one is committing a burglary and also happens to be in possession of common household items at that time. The statute was only meant to punish those intending to use items to facilitate a burglary. In cases involving common household items, such an intent can only rationally be proven through evidence of the items actual use in the burglary.

Merely because a person is intending to commit, or even committing, a burglary does not signify that the items in his possession are intended to be used as burglary tools. For example, if a person is apprehended after illegally entering a dwelling the mere fact that he possesses a credit card, pocket knife, or screwdriver, does not instantly support a charge of possession of burglary tools. These are items which even a trespasser with an intent to commit burglary may innocently possess. Unlike tools designed for breaking and entering, the possession of a common household item combined with the intent to commit a burglary does not yield a rational inference that the item was intended to be used to commit a burglary. Such would merely be speculation. Without some proof that the common

household item was used in a burglary or attempted burglary, there is no evidence for a jury to reasonably infer, rather than wildly speculate, that a defendant had the intent to use the common household item to perpetrate a burglary. Foster, supra; Preston, supra; State v. Thomas, 362 So.2d 1348 (Fla. 1978); K. W. v. State, 468 So.2d 368 (Fla. 2d DCA 1985); James v. State, 452 So.2d 1048 (Fla. 2d DCA 1984); Hubbell v. State, 446 So.2d 175 (Fla. 5th DCA), pet.rev.den., 453 So.2d 44 (Fla. 1984); Crosby v. State, 352 So.2d 1247 (Fla. 2d DCA 1977).

It should also be noted that between the time that Foster, supra, and Preston, supra, were decided the legislature amended the burglary tool statute to excise some surplus language. See, Preston, supra at 453. However, despite the interpretation of the statute by this Court in Foster, the legislature did not change the substantive law. It must be presumed that the legislature agreed with this Court's construction of the statute that the intent to use a common item in a burglary can only be proven by its actual use in a burglary. See, Johnson v. State, 91 So.2d 185 (Fla. 1956).

In addition, the following standard jury instruction on possession of burglary tools also indicates that in order for there to be sufficient proof of the intent to use a common tool as a burglary tool, the tool must in fact have been used in a burglary:

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; <u>Crosby v. State</u> , 352 So.2d 1247 | b. | [The [tool] [machine] [implement] was used by (defendant) or someone else to commit a [burglary] [trespass].] |

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

In the present case the evidence could show that Petitioner intended to commit a burglary and had a screwdriver in his possession. A screwdriver is a common household item. Foster, supra, at 551; Preston, supra. However, there was no evidence that Petitioner was going to use the screwdriver to accomplish the burglary. Such would only be speculation. The trial judge made the correct decision in determining, as a matter of law, that a reasonable jury could only speculate from the set of undisputed facts, rather than make rational inferences, that there was an intent to use the item as a burglary tool.⁴ The trial court acted correctly in granting the motion to dismiss.⁵ The district court's decision must be quashed.

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Again, the mere proof of an intent to commit a burglary does not mean that there was an intent to use the common household items in his possession to facilitate the burglary.

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Since there were no facts in dispute, judicial economy favors granting the motion prior to trial rather than pursuant to a motion for judgment of acquittal.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable Court to quash the decision of the district court.

Respectfully submitted,

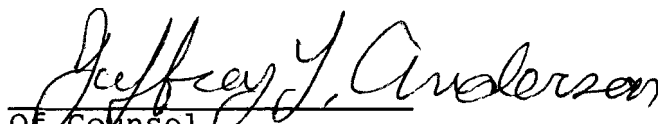
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by courier, to DEBORAH GULLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 25th day of February, 1988.


OF Counsel