IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 71,599

EARL MORRIS JACKSON,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT, STATEMENT OF THE CASE, AND STATEMENT OF THE FACTS

Respondent files the brief in answer to the brief of petitioner. Respondent accepts petitioner's recitations at pages 1-3 of its brief on the merits. Attached hereto as an appendix is the decision of the lower tribunal, which has been reported as Jackson v. State, 515 So.2d 394 (Fla. 1st DCA 1987).

SUMMARY OF ARGUMENT

Respondent will argue in this brief that he could not have been convicted of felony petit theft. The statute under which he was charged requires two petit thefts as prior offenses in order for the third petit theft to become a felony. Since criminal statutes must be strictly construed in favor of the defendant, the statute cannot be construed to allow the prior thefts to be grand thefts, and no court has the power to rewrite clearly defined criminal statutes. This Court must approve the holding of the lower tribunal.

ARGUMENT

THE LOWER COURT ERRED IN ENTERING JUDGMENT AND SENTENCE FOR FELONY PETIT THEFT

Section 812.014(2)(c), Florida Statutes, provides:

> Theft of any property not specified in paragraph (a) or paragraph (b) is petit theft and a misdemeanor of the second degree ... . Upon a second conviction for petit theft, the offender shall be guilty of a misdemeanor of the first degree ... . Upon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree ... .

(emphasis added). How much more clear can the wording be ?

At respondent's plea, it was stipulated that respondent had two prior convictions for grand theft from Lee County, and that the state was amending the information to rely on them for the required prior offenses. Respondent challenged the jurisdiction of the court to proceed on the information, while acknowledging that the decision in Hall v. State, 469 So.2d 224 (Fla. 2nd DCA 1985) was contrary to his position. The lower tribunal properly held that Hall improperly allows the judiciary to rewrite the legislative statutes.

In Hall, the defendant was charged with felony petit theft on the basis of a prior petit theft and a prior grand theft. He argued that the statute's requirement of two prior petit thefts could not be satisfied by one grand and one petit theft conviction. The court disagreed, finding that the Legislature could not have intended one in Hall's situation to be punished for only a misdemeanor for his third theft.

Hall was incorrectly decided and should not be followed by this Court. It ignores the plain language of the statute, quoted above. If the Legislature intended for a third theft to be punished as a felony, if a defendant had one prior petit and one prior grand theft, or if the defendant had two prior grand thefts, it would have said so. It is the Legislature's job to define the elements of criminal offenses, and to assess the penalties for such offenses. Those are not the functions of this Court, even if it appears that the legislative classification makes no sense. Tatzel v. State, 356 So.2d 787 (Fla. 1978). Where the Legislature has defined a crime in specific terms, those are the elements, and the courts have no power to define the crime differently. State v. Graydon, 506 So.2d 393 (Fla. 1987)(correctional officers not included within statute prohibiting resisting an officer); State v. Getz, 435 So.2d 789 (Fla. 1983)(Legislature intended two thefts be punished separately) and Thayer v. State, 335 So.2d 815 (Fla. 1976). This Court's holding in Graydon is fully applicable to the instant case:

> We are not going to speculate why the [L]egislature did not include state correctional officers within the statute. This court does not have the authority to legislate, and only the [L]egislature can include state correctional officers within the provisions of [the resisting statute].

506 So.2d at 394-95. Likewise, this Court may not speculate why the Legislature defined the felony petit theft crime to require two prior petit thefts as the predicate offenses.

Likewise, this Court has no authority to change the plain meaning of the statute.

Hall also ignores the well-recognized requirement that criminal statutes be construed strictly in favor of the accused. Section 775.021(1), Florida Statutes:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This requirement had been the law long ago, prior to the adoption of the theft statute, Bradley v. State, 79 Fla. 651, 84 So.677 (1920), and has been cited with approval as recently as last year in Carawan v. State, 515 So.2d 161 (Fla. 1987).

Because the clear wording of the felony petit theft statute requires two prior petit theft convictions, this Court has no power to construe the predicate crimes to include one prior grand and one prior petit theft, as in Hall, or to include two prior grand thefts, as in respondent's case. This Court must overrule Hall and approve the opinion of the lower tribunal.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that the opinion of the lower tribunal, which vacated his judgment and sentence and remanded for entry of a judgment for petit theft, be affirmed.

Respectfully Submitted,

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