

IN THE SUPREME COURT OF FLORIDA

JOHN E. HARDEE,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
)
 _____)

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TALLAHASSEE, FLORIDA

CASE NO. 71,708

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, John E. Hardee, the criminal defendant and appellant below in the appended Hardee v. State, 12 F.L.W. 2781 (Fla. 4th DCA Dec. 9, 1987), will be referred to as "petitioner". Respondent, the State of Florida, the prosecuting authority below, will be referred to as "the State".

No references to the record on appeal will be necessary.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous opinion of the Fourth District Court of Appeal in Hardee v. State, which the State adopts as its statement of the case and facts.

STATEMENT OF JURISDICTION/SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(iv) on the ground that this decision allegedly conflicts with decisions of other appellate courts such as, Sanders v. State, infra, on the same question of law. However, no basis for conflict certiorari jurisdiction exists insofar as the cases petitioner relies on for same are legally consistent with the decision over which review is sought.

ISSUE

THE COURT SHOULD NOT GRANT DISCRETIONARY REVIEW OVER THE DECISION BELOW ON THE BASIS OF ALLEGED BUT NON-EXISTENT CONFLICTS WITH OTHER APPELLATE COURT DECISIONS.
(Restated).

ARGUMENT

Petitioner seeks to establish this Court's "conflict" certiorari jurisdiction by implying that the Fourth District's decision directly and expressly conflicts with decisions of other District Courts such as Sanders v. State, 352 So.2d 1187 (Fla. 1st DCA 1977), State v. Rodriguez, 402 So.2d 86 (Fla. 3d DCA 1981) and Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981). The State asserts that Petitioner has not demonstrated conflict with other state appellate decisions from the face of the decision in the instant case, that the decision does not conflict with other decisions, and that this Honorable Court therefore lacks jurisdiction to grant Petitioner's application for discretionary review.

In Sanders v. State, supra, the First District, in interpreting Florida Statute § 810.02(2)(b), stated that, "the mere showing of theft of a gun after entering a structure, standing alone, is insufficient to establish burglary armed with a dangerous weapon". (emphasis added). Subsequently, in Wilson v. State, 438 So.2d 108, 109 (Fla. 1st DCA 1983), the First

District clarified Sanders by holding that a showing of theft of a gun would be sufficient to establish enhanced burglary, pursuant to Florida Statute § 810.02(2)(b), where it is also shown that the defendant possessed ammunition during the burglary. Accordingly, whether or not the gun was actually loaded was not relevant, as long as ammunition was readily available close by.

Similarly the courts in Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981) and Fowler v. State, 375 So.2d 879 (Fla. 2nd DCA 1979), have also recognized that a burglary is enhanced to armed burglary where a gun is stolen during the burglary and the defendant possesses ammunition at that time.

Accordingly, the Fourth District in Hardee v. State, 12 F.L.W. 2781 (Fla. 4th DCA Dec. 9, 1987), held consistently with the above decisions. The court also relied on the analysis involved in this Court's decision in Bentley v. State, 501 So.2d 600 (Fla. 1987). Thus the Fourth District's holding that evidence showing a gun and ammunition stolen during a burglary is sufficient to enhance that burglary to armed burglary, under Florida Statute § 810.02(2)(b), is not in express or direct conflict with any appellate court decisions.

Thus, the cases cited by Petitioner do not legally conflict with Hardee as Petitioner claims. All of these cited decisions consistently apply the same legal principle. Accordingly, this Court must deny Petitioner's petition for writ of conflict certiorari.

CONCLUSION

WHEREFORE, based upon the foregoing analysis and authorities cited herein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by courier to: TANJA OSTAPOFF, ESQUIRE, Assistant Public Defender, 15th Judicial Circuit, 301 N. Olive Avenue/9th Floor, West Palm Beach, Florida 33401 this 26th day of January, 1988.

Mardi L. Cohen

Of Counsel