IN THE SUPREME COURT OF FLORIDA

JOHN E. HARDEE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,708

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. The Respondent was the appellee and the prosecution, respectively, in those lower courts. In the brief, the parties will be referred to by name.

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

The symbol "R" followed by an appropriate page number will refer to the record on appeal in this case.

STATEMENT OF THE CASE

Mr. Hardee, 19, and a juvenile co-defendant were informed against for burglary of a dwelling while armed with a handgun (Count I) and grand theft (Count II) (R264).

Mr. Hardee was tried by jury on the charges (R270). His motions for judgment of acquittal having been denied (R196-201, 202), the jury found Mr. Hardee guilty of each count as charged (R268,269). He was immediately adjudged guilty in accordance with the jury's verdicts (R267).

Mr. Hardee's motion for new trial (R274) was denied (SR), and on March 12, 1986, he was sentenced to serve three and a half years in prison as to Count I (R276), to be followed by an eighteen month term of probation on Count II (R277).

On appeal to the Fourth District Court of Appeal, Mr. Hardee's conviction was upheld. This Court accepted jurisdiction of the instant cause on March 23, 1988, based on the conflict between the district court's decision below and decisions of other district courts of appeal on the question of whether or not a gun stolen during a burglary must be loaded in order to justify a defendant's conviction for "armed" burglary.

STATEMENT OF THE FACTS

Sometime in the morning of Sunday, July 7, 1985, Lucille Guasti discovered that her house had been burglarized while she, her four children, and her eldest son's girlfriend slept (R169, 171-172). Ms. Guasti determined that the master bedroom, in which she had not been sleeping that night, had been ransacked (R170). Her jewelry, worth about $5,000, was missing, and her car had also been taken (R174). Ms. Guasti reported the burglary and theft to the police. Later that day, she discovered that a gun was missing, as well as a plastic case containing bullets which was kept next to the gun (R175,177).

The next day, detectives investigating the burglary drove to the Dade County Jail, after being informed that Mr. Hardee and his co-defendant had been arrested in possession of Ms. Guasti's car (R143-144). Mr. Hardee was advised of his rights, which he waived (R145). He told the officers that after having several drinks (R210), he and a friend decided to break into the Guasti house because they knew some cocaine dealers lived there (R183). But Mr. Hardee did not take a gun and never knew anything about it (R162). He thought maybe his codefendant had sold it on one of their stops in Miami when they were trying to sell the car (R150,195).

Mr. Hardee's apartment was searched pursuant to a search warrant (R153). Items of jewelry identified as hers by Ms. Guasti were found, as well as a plastic box containing ammunition (R177). A lid which the thieves had left behind fit the box (R177-178).

SUMMARY OF THE ARGUMENT

The requirement of Section 812.02(2), Florida Statutes, that a defendant be "armed" with a gun in order to be convicted of the enhanced charge of burglary while armed requires more than mere possession of a firearm. Thus, the taking of an unloaded gun during the course of a burglary is insufficient to establish commission of armed burglary.

ARGUMENT

POINT INVOLVED

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AS TO WHETHER THE STATE MUST PROVE THAT A GUN STOLEN DURING A BURGLARY WAS LOADED OR THE DEFENDANT HAD AMMUNITION WHICH FIT IT IN ORDER TO SUPPORT A CONVICTION FOR ARMED BURGLARY.

Section 810.02(2), Florida Statutes (1985) provides:

> Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment ... if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed or arms himself within such structure or conveyance with explosives or a dangerous weapon.

(Emphasis added). The state sought and obtained Mr. Hardee's conviction under Section 810.02(2)(b), based on evidence that Mr. Hardee's codefendant, without Mr. Hardee's knowledge, stole an unloaded gun during a burglary the two boys committed. Also taken was a box of ammunition, kept in the same place as the gun (R175,177). Thus, the question presented in the instant case is whether a defendant who steals an unloaded gun during the course of a burglary "arms" himself within the meaning of Section 810.02(2), so that he is subject to conviction for the enhanced offense of armed burglary. In answering this question, it is important to note that the burglary statute, unlike Section 775.087(1), Florida Statutes (1985) is not triggered by a defendant's mere "possession" of the offending weapon. In the burglary statute, to the contrary, the defendant must be "armed" with

the weapon. The distinction between being "armed" or "equipped" with a weapon, as opposed to merely possessing it, is suggested in the example cited in Black's Law Dictionary (1968):

> A vessel is "armed" when she is fitted with a full armament for fighting purposes. Murray v. The Charming Betsy, 2 Cranch, 121, 2 L.Ed. 208.

(Emphasis added). Thus, a weapon may be "possessed" by a collector, a craftsman, a thief, or a repairman for esthetic, utilitarian, or technical purposes having nothing to do with either an intention or ability to use it offensively or defensively as a weapon. Whether the weapon is operational has no effect on these people's possession since they do not intend to use it as a weapon but only to look at it, sell it, or repair it. If a person is described as "armed" with a weapon, however, the capability of using that weapon as a weapon, rather than as an esthetic or commercial object, is implicit. This distinction is further manifested by the fact that Section 810.02(2) applies only where the burglar arms himself with a "dangerous" weapon.

Consequently, while mere possession of an unloaded gun which nevertheless meets the definition of a "firearm" requires imposition of a mandatory minimum sentence under Section 775.087(2) Florida Statutes;[1] Bentley v. State, 501 So.2d 600 (Fla. 1987);

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[1] Any person who is convicted of an enumerated felony "and who had in his possession a 'firearm,' as defined in s.790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years." (Emphasis added).

that same unloaded gun can hardly be considered a "dangerous" weapon with which the burglar has "armed" himself under Section 810.02(2). See, Bentley, id. at 602.

This is the analysis which has prompted the district courts of appeal to consistently hold, ever since the now venerable case of Sanders v. State, 352 So.2d 1187 (Fla. 1st DCA 1977), that proof that a gun was stolen during a burglary is insufficient, standing alone, to demonstrate that the burglary was committed while the defendant was armed with a deadly weapon. In order to sustain a conviction of armed burglary, the state must show either that the gun was loaded when taken, State v. Rodriguez, 402 So.2d 86 (Fla. 3d DCA 1981), or that the defendant also had in his possession, contemporaneously with the gun, ammunition which rendered him capable of loading it. Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981); Fowler v. State, 375 So.2d 879 (Fla. 2d DCA 1979). Only under such circumstances can the defendant be considered truly "armed" with, rather than merely possessed of, a dangerous weapon.

Turning to the facts of the present case, the state established that an unloaded gun and a box of ammunition were taken during the burglary committed by Mr. Hardee and his codefendant. But the state never proved that the ammunition taken could fit the unloaded gun, making it operational as a dangerous weapon. Ms. Gausti, the owner, testified that she believed the gun was a .22 caliber weapon (R175), although an investigating detective offered hearsay testimony that she told him it was a .25 caliber gun (R165). The prosecutor stated that the ammunition was .22

and .25 caliber (R199), but no evidence to this effect was ever introduced, nor did anyone ever testify that the ammunition could have been loaded into and fired from the gun. And, contrary to the trial court's misconception (R200), the fact that the ammunition was introduced into evidence so the jury could examine it could not substitute for proof of its caliber. See, McDaniels v. State, 388 So.2d 259 (Fla. 5th DCA 1980) [fact that shotgun was in evidence did not relieve state burden of proving it was shorter than legally permitted.]

Therefore, the state failed to prove that the ammunition taken during the burglary fit the gun and was thus capable of transforming it into a dangerous weapon with which the burglars armed themselves. The evidence was insufficient to establish that Mr. Hardee was guilty of armed burglary, and his conviction for that offense must be vacated.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Hardee respectfully requests that this Court reverse the judgment of the Fourth District Court of Appeal and remand this cause for reconsideration on the basis that in order to establish a defendant's guilt of armed burglary where a firearm is stolen during the burglary, the state must prove either that the gun was loaded or that the defendant contemporaneously possessed ammunition capable of being fired from the gun.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MARDI LEVEY COHEN, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 18th day of April, 1988.

Of Counsel