IN THE SUPREME COURT OF FLORIDA

JOHN E. HARDEE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 71,708

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

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

In the brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

All Emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as found on pages two (2) through (4) of Petitioner's Brief on the Merits to the extent that it is non-argumentative and non-conclusory and would make the following additions and/or clarifications:

1. Mrs. Guasti, the victim, discovered her gun (Barretta) and ammunition were missing from the top drawer of her husband's armoire the afternoon after she reported her jewelry and car were stolen to the police (R 175).

2. The gun and bullets were kept in the same drawer in her husband's armoire (R 175).

3. She contacted the police the next morning concerning the stolen gun and ammunition (R 176).

4. The basis for Appellant's Judgment of Acquittal as preserved on the record was that the State did not prove the firearm was operable (R 196).

SUMMARY OF THE 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 decisions over which review is sought.

Pursuant to Section 812.02(2) Florida Statutes (1983) a defendant convicted of armed burglary with a dangerous weapon is guilty of an enhanced burglary. Thus, a defendant who steals an unloaded gun and its ammunition during the commission of a burglary is subject to conviction for the enhanced offense of armed burglary as the gun can be easily made operable. Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981).

ISSUE

THE DECISION BELOW DOES NOT CONFLICT 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.

ARGUMENT

Initially, the State asserts that this Honorable Court lacks jurisdiction to review the decision below. Here, Petitioner has failed to show a conflict among the appellate court decisions, as in fact, none exists. The decisions of Sanders v. State, 352 So.2d 1187 (Fla. 1st DCA 1977), State v. Rodriquez, 402 So.2d 86 (Fla. 3rd DCA 1981) and Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981) are consistent with each other as they apply one rule of law in the context of three distinct factual scenarios.[1] Again, the State maintains that this Honorble Court must decline to accept jurisdiction in this cause.

However, Respondent will nonetheless address the merits of this case. In the instant case the prosecution proved at trial that Petitioner's co-defendant stole a gun and ammunition during a burglary they both committed. The victim testified that

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[1] In fact in Mills v. State, supra, the court noted that the decisions of Fowler v. State, 375 So.2d 879 (Fla. 2d DCA 1979) and State v. Dopson, 523 So.2d 644 (Fla. 4th DCA 1975) are not inconsistent with Sanders v. State, supra, and that its decision in Mills can also be reconciled with Sanders as Sanders did not state whether the weapon in the defendant's possession was loaded or unloaded.

the gun and its bullets were kept together in the same dresser drawer (R 175). The evidence revealed that the gun and bullets were taken together. The trial court in denying Petitioner's motion for a directed verdict relied on Mills v. State, supra, and held that since the State proved that the gun and ammunition were taken from the same drawer the State had established its prima facie case.

The issue before the Fourth District Court of Appeals and which is now before this Honorable Court is whether a defendant who steals an unloaded gun and its ammunition during the course of a burglary "arms" himself within the meaning of Section 810.02(2), Florida Statutes (1983) so that he is subject to conviction for the enhanced offense of armed burglary. The Fourth District relying on the reasoning applied in this Court's decision in Bentley v. State, 501 So.2d 600 (Fla. 1987), answered this question in the affirmative. The Fourth District reasoned that an unloaded gun with readily accessible bullets constitutes a dangerous weapon under the statute. Accordingly, although the gun may be unloaded the bullets could very easily have been loaded into the gun thus making it operable.

In Bentley v. State, supra, the question was presented to this Court "whether an unloaded firearm without proof of readily available ammunition, ... invokes the three-year mandatory sentencing provision of Section 775.087(2), Florida Statutes (1983)". Although this is not the same issue as is before this

court now, the reasoning of that decision is persuasive to an analysis of the issue, sub judice. In Bentley, this Court determined that whether a firearm is loaded or unloaded is not material to the issue of whether a defendant convicted of a burglary had in his possession a firearm so as to impose a mandatory minimum sentence pursuant to Section 775.087(2). The Bentley decision disapproved of Wilson v. State, 438 So.2d 108 (Fla. 1st DCA 1983) which required that the State had to prove that the firearm in a defendant's possession was operable.

Petitioner attempts to distinguish Bentley by drawing a distinction between mere "possession" of a dangerous weapon pursuant to Section 775.087(1) and "arming" oneself with a dangerous weapon pursuant to Section 810.02(2). However, that distinction is merely an insignificant semantic distinction. Here both statutes have the same dual purpose, they seek to impose a penalty for the use or attempted use of a dangerous weapon during the commission of a felony, Section 775.087 penalizes those who carry, display, use, threaten or attempt to use any weapon or firearm during the commission of a felony and Section 810.02 penalizes those who arm themselves with a deadly weapon during commission of a burglary. Both statutes penalize a proscribed violent act, that is, the use of a dangerous weapon during the commission of a felony. Thus, Petitioner's argument that "armed" means to fight and "possession" means something to "look at ... sell ... or ... repair ..." is simply a play-on-

words (Respondent's Brief at page 7).

There certainly is no question that an unloaded gun without any available ammunition, stolen during a burglary is insufficient proof to demonstrate that the defendant was armed with a deadly weapon when the burglary occurred. Sanders v. State, 352 So.2d 1187 (Fla. 1st DCA 1977). However, where the unloaded gun is stolen along with the ammunition, there is sufficient proof to demonstrate that the defendant was armed with a deadly weapon, considering the ease with which it takes to load the gun. Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981); Fowler v. State, 375 So.2d 879 (fla. 2d DCA 1979).

In Mills v. State, supra, defendant was convicted of burglary of a dwelling which was enhanced to a first degree felony as he was armed during the burglary. Factually, defendant and his co-defendant burglarized a home and stole a shotgun and a box of shotgun shells. The defendant had the ability to load the gun while he was in the house but did not do so until he left the house. The Mills Court made the following observations:

> It is clear that under the facts of this case, as found by the jury, appellant had the ability at any time during the burglary and after he had possession of the shotgun and the shells, to insert the shells and make use of the weapon. Under Fowler and Dopson, if he had loaded the weapon, he would be considered armed. Is he any less armed merely because he carries the shells separate from the weapon? Would he be less armed if he had brought the shotgun or another firearm with him, keeping the shells handy in his

> pocket? Once the shotgun and the shells were united in appellant's possession, he had the capacity to use the weapon by the mere expediency of inserting one or more shells, and thereby commit the violent act the statute seeks to proscribe.

400 So.2d at 518. The court then held that pursuant to Section 810.02(2) defendant had armed himself with a dangerous weapon.

In the instant case, the Fourth District like the Mills court noted that an unloaded gun with available ammunition close at hand is the same as a loaded dangerous weapon as prescribed in Section 810.02(2). In Hardee the gun was taken from the same drawer as the bullets and they were taken together. This was sufficient proof to demonstrate that Petitioner was armed with a deadly weapon.

Futhermore, Petitioner's argument that there was no direct proof that the bullets stolen actually fit the gun which was stolen, is flawed as there was certainly sufficient circumstantial evidence that the bullets which were with the gun in the dresser drawer were the bullets which fit the gun. Thus, a jury question was created.

In accordance with Mills v. State, supra, and Sanders v. State, supra, there is no basis for this Court's jurisdiction as no conflict in fact exists. Nonetheless, the decision of the Fourth District in Hardee v. State, and the decision of the Fifth District in Mills v. State, must be affirmed by this Court.

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; and in the alternative, to affirm the decision of the Fourth District Court of Appeal.

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 the Merits has been furnished by courier to: TANJA OSTAPOFF, ESQUIRE, Assistant Public Defender, Counsel for Petitioner, Fifteenth Judicial Circuit of Florida, 301 No. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401 this 9th day of May, 1988.

Mardi L. Cohen
Of counsel