047

IN THE SUPREME COURT OF FLORIDA

RAYMOND JOHNSON,

Petitioner,

v. CASE NO. 77,588

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

This is an appeal from the decision of the First District Court of Appeal in Johnson v. State, 574 So.2d 242 (Fla. 1st DCA 1991).

Petitioner was the appellant in the District Court and the defendant in the circuit court, and will be referred to in this brief as petitioner or by name. Respondent was the appellee in the District Court and the prosecutor in the circuit court, and will be referred to as respondent or the state.

Petitioner will designate references to the record and transcript by the symbols "R" and "T" respectively followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Petitioner was charged by a three count information with burglary of a conveyance, grand theft of property worth more than $300 and grand theft of a firearm (R 11).

The grand theft counts arose from the same act wherein petitioner was alleged to have reached into the victim's car and taken a purse containing the property alleged in count II and the firearm alleged in count III.

The case was tried before a jury on October 26, 1989 (T 2).

Betty Lu Green testified. She and John Mixon (who did not testify at trial) were at a Tenneco station. She went inside to pay for the gas while Mixon pumped it. Mixon ran into the service station and told her a man just stole her purse (T 39-40). Green said that when she went in to pay for the gas, her purse was in the car. The purse contained about one thousand dollars in cash, three payroll checks, some jewelry which she described in detail, and a .25 automatic firearm (T 41-44).

Green did not see her purse taken or anyone running from the scene (T 40; T 46).

She testified that at work earlier in the day she had kept her purse in a cubbyhole. She agreed that several people had access to the area, but stated that the cubbyhole was in plain sight (T 47).

Defense counsel's objection to the prosecutor's question of the victim, "Have you gotten any money for any of those items" was overruled. Green testified she had not (T 45).

Donald Chisholm testified at trial. On October 25, 1988 at about 9:20 p.m., he was working as a cashier at the Tenneco Station located in Hawthorne, Florida (T 16).

Chisholm was collecting money from Betty Lu Green who was paying for her gas. He looked out the window and saw petitioner come by the window. Two seconds later, he heard someone yelling "stop, stop". He then observed petitioner fifty yards away, running, with his back to Chisholm (T 22; T 27).

Chisholm never saw petitioner holding the missing purse or any other item (R 27).

Chisholm testified that he had seen petitioner previously "several times prior to that particular date, October 25th" (T 16). However, it was unclear from his testimony over what period of time he had seen petitioner previously as evidenced by the following colloquy:

> Q. When you say you've seen him several times, how long, in the course of a length of time, have you seen him?
>
> A. Approximately two weeks prior to this incident.
>
> Q. And for how long -- I think I'm asking now a period -- of over ten years, over one year, or -- versus one month -- have you seen him on and off?
>
> A. Approximately every day (R T 17).

This confusion over Chisholm's answer was shared by a juror as evidence by the juror's question concerning this testimony (T 61).

Stacey Chaffin, a deputy with the Alachua County Sheriff's Office, testified that he responded to a call at a Tenneco Station on October 25, 1988 at 9:20 in the evening (T 30). Over defense counsel's hearsay objection, Chaffin testified that "Ms. Green advised me that an unknown suspect had entered her vehicle and removed several items while she was inside the Tenneco Station purchasing some items inside" (T 31).

Chaffin obtained a description from the witnesses (T 32).

Over defense objection and after a proffer, Chaffin testified before the jury to the following. He was advised a warrant had been issued for petitioner. He made several contacts in the Hawthorne area and was given information as to where petitioner might be. Chaffin testified that on one or two occasions he saw petitioner and stated to petitioner, "hey, man, come here; I need to talk to you for a second". At that point, petitioner would run from Chaffin.

Chaffin said he stopped looking for petitioner when he heard petitioner was arrested in Broward County (T 37).

Willie Garrison, an investigator with the Alachua County Sheriff's Department, testified that Chisholm identified petitioner from a photographic line-up. He also showed the line-up to John Mixon, who was unable to make an identification (T 51-52).

Over petitioner's objection, Garrison testified that on November 3rd, 1988 he observed petitioner. Garrison identified himself to petitioner. Appellant was running and continued to run. Appellant eluded officers in the Hawthorne area for several weeks and then went to South Florida (T 56). On defense motion, Garrison's statement that petitioner eluded them in the Hawthorne area for several weeks and was arrested in South Florida was struck (T 56-57).

The state rested.

Petitioner's motion for a directed judgment of acquittal was denied (T 58).

The defense rested. Petitioner's renewed motion for directed judgment of acquittal was also denied (T 60).

The jury returned a verdict of guilty on all counts as charged (R 40).

On October 20, 1989 petitioner was sentenced to four and one-half years on each count to run concurrent (R 43-47).

The First District Court of Appeal affirmed petitioner's conviction. However, in so doing the appellate court certified to this Court the following question of great public importance:

> WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF GRAND THEFT OF PROPERTY (BETWEEN $300 AND $20,000) AND OF A FIREARM IN A SINGLE ACT, AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 19880, IS IT UNLAWFUL TO CONVICT AND SENTENCE FOR BOTH CRIMES?

Petitioner filed a timely notice to invoke discretionary jurisdiction and this proceeding follows.

III SUMMARY OF ARGUMENT

In the first issue, petitioner contends the trial court erred in denying petitioner's motions for judgment of acquittal. The evidence in the case was circumstantial evidence based on petitioner's presence at the scene of the burglary and grand theft, and his flight therefrom. The law is clear that these circumstances alone are insufficient to support a conviction. Petitioner asks this Court to reverse the trial court's order denying petitioner's motions for judgment of acquittal.

In the second issue, petitioner submits the trial court reversibly erred in instructing the jury on flight. The law does not support a flight instruction where there are no other circumstances indicating guilt. Further, the instruction in this case had the effect of misstating the law applicable to petitioner's case, i.e. that presence at the scene of a crime and flight are not a sufficient circumstances, without more, upon which to base a conviction.

Petitioner submits in issue three that the trial court reversibly erred in overruling petitioner's objection to testimony from the victim that she had not received any restitution for the items taken. This was irrelevant to the issues at trial and was prejudicial to the petitioner in that its result was to evoke sympathy from the jury for the victim.

Petitioner, in the fourth issue, addresses the question certified by the District Court of Appeal. Petitioner contends that the trial court erred in entering judgments and

convictions for two counts of grand theft where each count was based on the same act of taking the victim's purse.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTIONS FOR DIRECTED JUDGMENT OF ACQUITTAL.

Taken in the light most favorable to the state, the state established that Betty Lu Green's purse disappeared from her car between the time that she went in to pay for her gas and the time she returned. They further established, through hearsay, that her companion came up to her during that period of time and stated that someone had just stolen her purse. Within that same time period, Chaffin looked out the window and observed petitioner running from the scene. Petitioner avoided subsequent efforts by law enforcement to serve a warrant issued against peitioner concerning the incident.

Petitioner submits that petitioner's flight from the scene of the crime was insufficient circumstantial evidence upon which to base his conviction and thus the trial court erred in denying petitioner's motions for directed judgment of acquittal.

Apposite to the case at bar is Palmer v. State, 483 So.2d 496 (Fla. 1st DCA) rev. denied 494 So.2d 1152 (Fla. 1986). In Palmer, a prison guard was approached by another individual who told the guard, "two white dudes were breaking into the hospital." Further responding to a call of a burglary in progress, the guard observed Palmer attempting to climb out of a pharmacy window. Near Palmer was a box containing drugs missing from the pharmacy. During the same time frame, another

correctional officer observed Brown coming from the pharmacy's direction and acting suspicious. Brown was unable to provide either a pass or a satisfactory explanation for being in this unauthorized area of the prison. Subsequent to his arrest, Brown cut his hair, the result of which was to prevent the state from comparing samples of Brown's hair to unknown hairs found in the pharmacy.

The appellate court reversed the trial court's denial of Brown's motion for judgment of acquittal stating,

> It is well established that circumstantial evidence, to be legally sufficient, must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. Harrison v. State, 104 So.2d 391 (Fla. 1st DCA 1959); McArthur v. State, 369 So.2d 578 (Fla. 1979). Further, on appeal the trial court's denial of a motion for judgment of acquittal, the "test" is "whether the jury as the trier of fact might reasonably conclude that the evidence excluded every reasonable hypothesis but that of guilt." Knight v. State, 392 So.2d 337 (Fla. 3d DCA 1981). Although the petitioner's unauthorized and unexplained presence in the area of the pharmacy no doubt raises suspicion, we do not believe it to be legally sufficient for a jury to infer that Brown "enter[ed] or remain[ed] in a structure with the intent to commit an offense therein." Section 810.02(1), Florida Statutes. See Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983) and the cases cited therein for the proposition that evidence that a suspect is present at the scene of a crime and flees after the crime's commission is insufficient to exclude a reasonable hypothesis of innocence.

Id. at 498. See also Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986) rev. denied 503 So.2d 328 (Fla. 1987); State v. Law, 559 So.2d 187 (Fla. 1990); Broner v. State, 559 So.2d 745 (Fla.

2d DCA 1990) (summarized below); M.F. v. State, 549 So.2d 225 (Fla. 3d DCA 1989) (presence in and quick departure from area where stripped vehicle found not legally sufficient to establish guilt as aider and abettor); Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983) (summarized below).

Similarly, in the recently decided case of Broner v. State, supra, the appellate court found the trial court erred in denying Broner's motion to dismiss a grand theft charge. The undisputed facts established that Broner had consensual access to the owner's home. Ten minutes later, the owner discovered her property missing and the rear door of the home unlocked. A neighbor observed Broner leave the home empty handed. The court found the above stated facts insufficient, as a matter of law, to sustain a conviction for grand theft.

In Owen, supra, an unidentified intruder assaulted the victim in her bedroom. Within a few minutes, neighbors observed an unknown male "flash out from the side of the garage." When the neighbors arrived at the victim's front lawn, they observed a man, subsequently identified as Owen, "running from the side of the house down the street." Id. at 580. The appellate court held the trial court erred in denying Owen's motion for directed judgment of acquittal, stating:

> Here, the defendant was never identified as the person who committed or attempted to commit the sexual battery, or as the person who committed the burglary. A fundamental principle of our criminal law is that the prosecutor must establish beyond a reasonable doubt the identity of the accused as the perpetrator of the charged offense. When the state fails to meet its

> burden of proving each and every necessary element of the offense charged beyond a reasonable doubt, the case should not be submitted to the jury, and a judgment of acquittal should be granted. Ponsell v. State, 393 So.2d 635 (Fla. 4th DCA 1981). Furthermore, the offense of burglary requires an "entering or remaining in a structure or conveyance with the intent to commit an offense therein." s.810.02(1), Fla. Stat. (1979). No one saw the defendant enter the victim's home, remain in the house, or leave the house. The state did not offer any evidence of fingerprints, palmprints, or footprints in or about the house. The evidence did establish that he was in the yard, but no one offered testimony to indicate any more than that he was a prowler.

Id. at 581.

In the case at bar, as in Palmer, supra, and the other cases cited herein, the state's evidence established petitioner was at the scene of a crime and he fled from that scene. As in Palmer, the circumstantial evidence presented was insufficient to sustain his conviction.

The trial court reversibly erred in not entering a judgment of acquittal contravening Fla.R.Crim.P. 3.380 and petitioner's right to due process of law as guaranteed by Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution.

Petitioner's conviction and sentence should be reversed and the case remanded for entry of a judgment of acquittal.

ISSUE II

UNDER THE FACTS IN THE CASE AT BAR, THE TRIAL COURT ERRED IN RULING ADMISSIBLE EVIDENCE OF FLIGHT AND FURTHER IN INSTRUCTING THE JURY THAT FLIGHT COULD BE CONSIDERED EVIDENCE OF GUILT.

The evidence against petitioner was that a crime was committed and that petitioner was seen running from the vicinity of the crime subsequent to its commission. The state was allowed to further introduce evidence that petitioner at a later time fled at the sight of police officers.

Petitioner submits the admission of this "flight" evidence was error and further that the trial court reversibly erred in overruling petitioner's objection to instructing the jury on flight.

As a general rule, flight evidence is admissible as relevant to a defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. Merritt v. State, 523 So.2d 573 (Fla. 1988). "However, flight alone, is no more consistent with guilt than with innocence." Id. at 574.

In the case at bar, the evidence did not even establish that petitioner knew that a crime had been committed. He was not seen in possession of any of the proceeds of the crime. His subsequent flight from police officers, days after the commission of the offense and in a different area of town, allows only a speculative conclusion that petitioner fled to avoid prosecution for the theft of Green's purse. Such

speculation does not give sufficient probative value to the evidence to allow its admission. See Merritt v. State, supra.

Further, the court erred in instructing the jury on flight.

Evidence of flight, without more, is insufficient to support a flight instruction. Jackson v. State, 575 So.2d 181 16 F.L.W. S151 (Fla. January 18, 1991); Whitfield v. State, 452 So.2d 548 (Fla. 1984); Proffitt v. State, 315 So.2d 461 (Fla. 1975); Batey v. State, 355 So.2d 1271 (Fla. 1st DCA 1978).

In Jackson this Court stated:

> Finally, we find merit in Jackson's contention that the trial court should not have instructed the jury to infer consciousness of guilt from flight. As we said in Whitfield v. State, 452 so.2d 548, 549 (Fla. 1984), an instruction of flight is permissible only "where there is significantly more evidence against the defendant than flight standing alone." Where the only evidence to tie the defendant to the crime is circumstantial, and the evidence of flight would be no more consistent with guilt than with innocence, the instruction is barred. Id. at 550; see also Rhodes v. State, 547 So.2d 1201, 1203 (Fla. 1989) (evidence that defendant was stopped for speeding after a murder had taken place was insufficient to support instruction that defendant was fleeing to avoid prosecution). Here, the only evidence of flight was that two unidentified men ran from the store, and a witness saw Jackson driving away from the general direction of the store, possibly in excess of the speed limit. Departure from the scene of a crime, albeit hastily done, is not the flight to which the jury instruction refers. Otherwise, the instruction would be given every time a perpetrator left the scene, and it would be omitted only in those cases where the perpetrator waited for the police to arrive. The evidence in this case did not

> warrant an instruction on flight. See id.; Bundy v. State, 471 So.2d 9, 21 (Fla. 1985), cert. denied, 479 U.S. 894 (1986); Whitfield, 452 So.2d at 549-50.

Jackson, 16 F.L.W. at S154.

While this Court found the flight instruction in Jackson to be harmless error, this Court noted in its ruling that "none of the errors here were fundamental, nor did they go to the heart of the state's case since each was ancillary to the facts linking Jackson to the crime". Id. at S154.

In sharp contrast, in the case at bar the evidence against petitioner was that a crime was committed and that petitioner was seen running from the vicinity of the crime subsequent to its commission. The state was allowed to further introduce evidence that petitioner at a later time fled at the sight of police officers. Thus the flight instruction concerned evidence which did go to the heart of the state's case and in fact was the state's case.

In Proffitt, this Court upheld instructing the jury on flight because there was other evidence in the record besides flight. This evidence included testimony by witness Bassett that she heard petitioner, on the same evening as the crime which involved the death of a man and assault on a woman, state that he had killed and robbed a man and beaten a woman. The court opined:

> The general rule in Florida as correctly pointed out by the petitioner is to the effect that the defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing alone, no more consistent with

> guilt that with innocence. Harrison v. State, 104 So.2d 391 (Fla.App.1958). However, in the case at bar, there exists significantly more evidence in the record than flight standing alone. There is the uncontroverted, unimpeached testimony of Mrs. Bassett. There is the phone call to the police by the defendant's wife and, finally, there is the flight itself.

Id. at 465-466. See Batey v. State, supra (trial court did not err in instructing on flight inasmuch as facts presented at trial were sufficient to find existence of flight and other circumstances indicated guilt).

In this case, the flight instruction was not only not supported by the totality of the evidence adduced at trial, its inclusion in the jury instructions misled the jury into believing that they could convict based solely on that flight when such is not the law. (See Issue I of this brief and cases cited therein for the proposition that flight alone cannot support a conviction).

The result was to deny petitioner a fair trial and due process of law in contravention of Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution.

If this Court does not rule in favor of petitioner on Issue I of this brief, then petitioner's conviction should be reversed and the case remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S OBJECTION TO THE TESTIMONY OF THE VICTIM THAT SHE HAD NOT RECEIVED ANY MONEY FOR ANY OF THE ITEMS STOLEN.

Irrelevant evidence is inadmissible. See Section 90.402, Florida Statutes (1989). Relevant evidence is defined by the Florida Evidence Code as "evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1989).

The evidence introduced by the state that Green had not received any money for the items stolen is patently irrelevant to a determination of whether a grand theft occurred and whether or not appellant committed that theft.

Thus, the trial court erred in overruling petitioner's objection to this line of testimony.

The state had previously established that Green worked as a waitress and was planning on using the money in her purse to pay bills. The testimony that she would receive no reimbursement for the stolen funds, while irrelevant to the issues at trial, certainly was calculated to and did arouse the jury's sympathy for the victim.

Given the paucity of evidence against the accused, the erroneous admission of this evidence cannot be deemed harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Petitioner's conviction should be reversed and the case remanded for a new trial.

ISSUE IV

PETITIONER'S TWO CONVICTIONS FOR GRAND THEFT VIOLATE THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The First District Court of Appeal certified the following question as one of great public importance:

> WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF GRAND THEFT OF PROPERTY (BETWEEN $300 AND $20,000) AND OF A FIREARM IN A SINGLE ACT, AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 19880, IS IT UNLAWFUL TO CONVICT AND SENTENCE FOR BOTH CRIMES?

Count II of the information charged petitioner with taking property from Green of a value of greater than three hundred dollars but less than twenty-thousand dollars. Count III charged petitioner with taking a firearm. It was clear from the evidence adduced at trial that the property and firearm were taken at the same time by the same act when Green's purse was taken.

Sections 810.014(1) and 810.014(2), Florida Statutes (1989) define theft and establish the penalties for theft. They state in relevant part:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) deprive the other person of a right to the property or a benefit therefrom. (b) appropriate the property to his own use or to the use of any other person not entitled thereto.
>
> * * *
>
> (c) It is grand theft of the third degree and a felony of the third degree,

punishable as provided in ss. 775.082, 775.083 and 775.084, if the property stolen is:
1. Valued at $300 or more, but less than $20,000.

* * *

3. A firearm.

Petitioner recognizes this Court has found no double jeopardy violation on similar claims but submits these are distinguishable. See State v. Getz, 435 So.2d 789 (Fla. 1983); Grappin v. State, 450 So.2d 480 (Fla. 1984).

In Getz, this Court ruled that prosecution for grand theft of a firearm and petit theft, arising from the same act of taking, did not offend double jeopardy. In Getz, the offenses prosecuted arose under different subsections of the state. Theft of a firearm was by definition grand theft, whereas theft of property under one hundred dollars was petit theft.

In the case at bar, the offenses prosecuted arise under the same subsection and grand theft can be proven by either proof that the property is a firearm or that the value of property taken in the theft is greater than three hundred dollars.

In Grappin, this Court held that theft of five firearms owned by the same individual from the same place at the same time did not offend double jeopardy. This Court relied on the article "a" which proceeded firearm for its decision.

In the case at bar, the section denoting property valued at greater than three hundred dollars is not proceeded by either "a" or "any" so even under Grappin legislative intent

that property valued at greater than three hundred dollars be prosecuted separately from a firearm is not clear.

A reading of the statute shows that grand theft is taking the property of another. If the property stolen is one of certain enumerated items the crime is grand theft. Those enumerated items include a firearm and property valued at greater than three hundred dollars (and less than twenty thousand dollars).

Since both a firearm and property valued at over three hundred dollars are included under the more general category of property under the grand theft statute, petitioner contends a reading of the statute does not support legislative intent to separately punish and further, that the constitutional prohibition against double jeopardy contained in Article I, Section 9 of the Florida Constitution and Amendments V and XIV of the United States Constitution bar separate convictions and punishment.

Petitioner's sentence and conviction for one count of grand theft should be vacated.

V CONCLUSION

Petitioner requests this Court reverse the District Court of Appeal's decision and that the case be remanded with directions to enter a judgment of acquittal in the case. If the court denies this relief, petitioner's convictions should be reversed and the case remanded for a new trial. Barring reversal of the judgment, petitioner's conviction and sentence on one of the grand theft convictions should be reversed.

Respectfully submitted,

NANCY A. DANIELS
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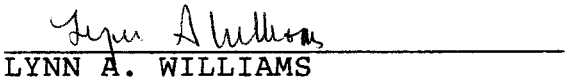
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Charlie McCoy, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Raymond Johnson, 2660 N.E. 8th Avenue, Apt. #18, Fort Lauderdale, Florida 33334, on this 9th day of April, 1991.

Lynn A Williams
LYNN A. WILLIAMS