OA 3-2-92

047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO.: 78,085

JO ANN CAMP,

Respondent.

/

MERITS BRIEF OF RESPONDENT
IN ANSWER TO PETITIONER

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STATEMENT OF THE CASE AND FACTS

On September 30, 1988, the State Attorney charged the Respondent, Jo Ann Camp, by Information with twelve (12) counts of Grand Theft occurring between October, 1984 and October 1987. (R20-23) On November 09, 1989, Stewart Stone, a designated Assistant State Attorney filed in open court an amended Information charging one hundred and nine counts of uttering a forgery, forgery and dealing in stolen property which crimes encompassed the same criminal acts charged in the original information. (R91-116) Finally, the State Attorney's Office filed a second amended Information on February 06, 1990, encompassing the same criminal charges but increased the counts to one hundred and fourteen, including forty-three (43) counts of dealing in stolen property. (R123-149)

Thereafter, the Respondent filed a Motion to Dismiss directed at the forty-three counts of dealing in stolen property. (R150-151) Generally, the facts of this case are not in dispute. The Respondent while working as a bookkeeper for "Brightwater Pools" for several years stole money from the business by unauthorizedly negotiating checks, some with the owner's true signature and some by forgery, for her personal needs making the checks payable

to Citibank, N.A., in Sioux Falls, South Dakota, to pay for her personal credit card account debts. (R1-19)

The basis of the Respondent's Motion to Dismiss which Judge Vernon Mize, Circuit Court Judge, Eighteenth Judicial Circuit, in and for Seminole County, Florida, granted was that the evidence in the light most favorable to the State was not sufficient to establish a prima facie case for dealing in stolen property.

The Fifth District Court of Appeals heard the State of Florida's appeal from the trial court's order dismissing the dealing in stolen property counts. The Fifth District Court of Appeal upheld the trial court's ruling. State v. Camp, 16 F.L.W. D1113 (Fla. 5th DCA April 25, 1991).

It is our position that the theft of the victim's checks to pay for the Respondent's personal credit card debt was a clearly personal and terminal use of the stolen checks and was simply the method by which the Respondent committed a theft of the victim's money; and therefore, did not present sufficient evidence to prove the charges of trafficking or dealing in stolen property contained within §812.019, Florida Statutes (1989).

LEGAL ISSUE

Does the unauthorized negotiation of a stolen check by the thief to pay for a personal debt of the thief constitute sufficient evidence to establish the crime of trafficking or dealing in stolen property within §812.019, Florida Statutes (1989)?

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal should be affirmed. When the original thief negotiates a stolen check to pay for his or her personal debt even though some form of transfer occurs, such evidence does not establish the crime of dealing in stolen property contemplated by Florida Statute §812.019 (1989). Evidence of theft only, with the intent to put the stolen item to its personal and intended use, constitutes the crime of theft under §812.014, Florida Statute (1989). The acts of the Respondent in stealing her employer's checks and negotiating them by giving them to her bank to pay h er personal bankcard or credit card debt, does not establish sufficient evidence of the crime of trafficking in stolen property under §812.019 Florida Statutes (1989).

ARGUMENT

NEGOTIATION OF A STOLEN CHECK TO PAY THE THIEF'S PERSONAL DEBT DOES NOT CONSTITUTE THE CRIME OF DEALING OR TRAFFICKING IN STOLEN PROPERTY PURSUANT TO §812.019, FLORIDA STATUTES (1989).

The Respondent agrees with the Petitioner that the rule of "strict construction" of penal statutes is fundamental. But that rule of construction has been misapplied by the Petitioner in its argument herein. The rule of strict construction is not a rule which broadens the term or definition of "trafficking" in Florida Statute §812.019 (1989) beyond that which was intended by the Florida Legislature. It should be applied oppositely to limit the definition of "trafficking" strictly and explicitly to that which was envisioned by the Florida Legislature.

In Perkins v. State, 576 So.2d 1310, 1312, 1313 (Fla. 1991), the Supreme Court of Florida reiterated the import of the rule of strict construction and stated the following:

> The rule of strict construction also rests on the doctrine that the power to create crimes and punishments in derogation of the common law inheres solely in the democratic processes of the legislative branch. Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982); accord United States v. L. Cohen Grocery Co., 255 U.S. 81, 87-93, 41 S.Ct. 298, 299-301, 65 L.Ed. 516 (1921) (applying same principle to Congressional authority). As we have stated,

> The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary. See Article II, Section 3, Florida Constitution.

Brown, 358 So.2d at 20; accord Palmer, 438 So.2d at 3. This principle can be honored only if criminal statutes are applied in their strict sense, not if the courts use some minor vagueness to extend the statutes' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers. Art. II, §3, Fla. Const.

Explicitly recognizing the principles described above, the legislature has codified the rule of strict construction within the Florida Criminal Code:

> 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. (Emphasis Added)
> §775.021(1), Fla.Stat. (1987).

Clearly, the State is asking this court to define the term "trafficking" as specified in Florida Statute §812.019 (1989) in its broadest sense to include any form of transfer of property. The State relies on Dixon v. State, 541 So.2d 637 (Fla. 1st DCA 1989) for the proposition that the thief who puts the stolen check to its normal and intended personal use, thereby placing it into the "stream of commerce" is guilty of dealing or trafficking in stolen property.

It is the Respondent's position that the Fifth District Court of Appeal in State v. Camp, 16 F.L.W. D1113 (Fla. 5th DCA April 25, 1991) properly applied the rule of strict construction by limiting the definition of "trafficking" in §812.019 Florida Statute (1989), and in so doing the court applied the limitations contained in the legislative history of §812.019 Florida Statutes (1989) and the limitations which would naturally apply to the anti-fencing statute described as dealing in stolen property. §812.019, Fla.Stat. (1989)

The Fifth District in applying the above principles stated:

> This crime, dealing in stolen property, is an anti-fencing statute and is intended to punish those who knowingly deal in property stolen by others. It is not intended to convert a third degree felony into a second degree felony merely because the thief sells the stolen property rather than consumes it.
>
> The legislative history of section 812.019 contains the following language:[1]
>
> > The attached proposed committee bill is an adaption of the Model Theft and Fencing Act, consistent with the organization of Florida law, as proposed by G. Robert Blakely and Michael Goldsmith, Criminal Redistribution of Stolen Property: The Need for Law Reform, 74 Mich.L.Rev. 1512 (1976). That article focuses on the receivers of stolen property as the central figures in theft

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1. Committee on Criminal Justice Memorandum dated April 7, 1977 concerning Proposed Committee Bill Relating to Stolen Property. Appendix "A" to Petitioner's Brief on the Merits.

> activities, and that the law should be focused on the criminal system that redistributes stolen goods.
>
> In this regard the statutes define "dealer in property" to mean any person in the business (emphasis theirs) of buying and selling property (§ 812.012(1), Fla.Stat.), and while both theft and dealing in stolen property may be charged in the same information and tried in the same action, a guilty verdict may enter for only one (§ 812.025, Fla.Stat.). This does not mean however, that the jury can arbitrarily choose between them. If the evidence convinces that the defendant stole the property for his own use, then theft is the verdict; if the evidence is only that the defendant obtained or sold stolen property and there is no evidence that he stole it, then dealing is the appropriate verdict. While one who steals with the intention of dealing through a fence, and does so, might well violate this provision, one who steals for his own account, so to speak, does not. This is consistent with the "personal use" analysis in Grimes v. State, 477 So.2d 649 (Fla. 1st DCA 1985), and the dissent in Dixon v. State, 541 So.2d 637 (Fla. 1st DCA 1989). Certainly, while Camp might well have been convicted of theft of the checks (surprisingly not charged), she did not deal in stolen property because she did not deal through or with a fence.

The question is not whether a check can form the basis of a charge of dealing in stolen property. Certainly under certain circumstances the transfer and disposal and/or disposition of stolen checks can form the basis of a charge of dealing in stolen property. The question is whether under the agreed facts in this particular case the State has presented a prima facie case for the charge of dealing in stolen property. We believe that the answer to that question must be no.

It is our belief that this case falls clearly within the ambit of the "personal use" cases and the "personal use" doctrine cited by the appellant in his initial brief.

It is further our position that the "Dixon" decision which involved the attempt to cash a forged check for money by the suspect was an unfortunate and confusing decision. It is a problem case which is continuing to plague the 1st District Court of Appeals because of its attempt to legislate a new definition for "trafficking" not envisioned by the law makers.

In Grimes v. State, 477 So.2d 649 (Fla.1st DCA 1985), the appellants' with knowledge that the food stamps which they possessed were stolen negotiated them at a local grocery store for the purchase of food. The appellants' were charged with dealing in stolen property. The appellate court ruled that the act of negotiating the stolen food stamps at the grocery store was not sufficient to prove the crime of dealing in stolen property and such evidence was otherwise only sufficient to prove the crime of theft. The Court in its ruling stated:

> "We concede that to trade stolen food stamps at a store for food is a form of transfer, distribution, dispensation, or disposition of the stamps. However, in our view the legislature did not intend that type of activity to be included in the proscriptions of Section 812.019. The trading of food stamps for food amounts to personal use of the stamps since, due to their intrinsic nature, as argued by the State, that is the only legitimate manner in which they can be used by their holder. Evidence of theft only, with intent personally to put the stolen item or items to normal use, constitutes only the crime

> of theft and not the crime of trafficking or dealing in stolen property within the meaning of Chapter 812, Florida Statutes, even if the normal use is achieved by some form of transfer, distribution, dispensation or disposition of the item.

The 1st District Court of Appeals in reaching this decision cited the cases of Townsley v. State, 443 So.2d 1072 (Fla. 1st DCA 1984), and Lancaster v. State, 369 So.2d 687 (Fla. 1st DCA 1979). The District Court laid down the "legal doctrine" that in cases where the accused is in knowing possession of stolen property for his or her own personal use he or she is guilty only of theft not dealing or trafficking in stolen property. In Townsley, supra, the prosecution argued that it was likely that the suspect would at some point sell the stolen car as he had the previous car. The Court in rejecting the prosecutor's argument stated:

> "We decline to contort the definition of trafficking."

In the present case, it is the Respondent's position that for the thief to negotiate a stolen check for personal use only, i.e., to use a stolen check to pay one's credit card indebtedness by mailing the stolen check to the credit card center to pay a personal obligation, is evidence of the criminal offense of theft under §812.014, Fla.Stat. (1989); but not dealing or trafficking in stolen property under §812.019, Fla.Stat. (1989). As stated in the Grimes, supra, the only evidence the State can offer is that the

Respondent took the check and put it to its normal and intended use and even though said use was achieved by some form of transfer....its intended use was personal, therefore only the crime of theft not trafficking or dealing in stolen property was committed.

The appellant relies upon the more recent 1st District Court of Appeals decision of Dixon v. State, 541 So.2d 637 (Fla. 1st DCA 1989) for its argument curiously Dixon, supra, held that an attempt to cash a stolen check at a bank was sufficient to charge the crime of dealing stolen property and the court found no basis to apply the "personal use" doctrine which it reiterated in Grimes, supra. The Court stated:

> The essence of the offense of dealing in stolen property, also referred to as "trafficking", is that the stolen property is being distributed or moved into the stream of commerce so as to have a detrimental effect beyond that of the original theft. A theft followed by a personal terminal use of the stolen property by the thief does not have the extra ingredient required for an offense under Section 812.019, Florida Statutes.

But Justice Ervin stated in his written dissent:

> "The distinction between checks and food stamps, as advanced by the majority's opinion, does not, in my opinion call for a different result. Although it is true that checks, unlike food stamps, may be placed in the stream of commerce and thus be subject to continued circulation, this distinction has nothing to do with the essential requisite that the state establish proof of the defendant's intent to sell, transfer, distribute or otherwise dispose of the property to other persons....The lesson derived from Grimes, and Townsley is that there must be

> competent, substantial evidence of a defendant's intent to dispose of property.....Proof thereof cannot be satisfied from what may possibly occur subsequent to the transaction in question. This conclusion, I maintain, is supported from the definition of a check itself, defined as "a draft drawn on a bank and payable on demand". §673.104(2)(b), Fla.Stat. (1987)(U.C.C.§3-104(2)(a)(1962). A check "contains an unconditioned promise or order to pay a sum certain in money....."§673.104(1)(b), Fla.Stat.(U.C.C.§3-104(1)(b). Moreover, "a check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." §673.409(1), FLa.Stat.(1987)(U.C.C.§3-409 (1)(1962).
>
> The check attempted to be cashed by the appellant below served only to direct the drawee bank to pay the face amount to the bearer.
> See Williams v. United States, 458 U.S. 279, 284, 102 S.Ct. 3088, 3091, 73 L.Ed.2d 767,773,(1982). Thus, because the check was a mere direction to the bank to pay a certain sum of money to the person named therein, the check's incidental passage through the stream of commerce is immaterial to any decision as to whether the defendant otherwise intended to traffic in stolen property. The transaction as to him was complete once he attempted to negotiate the check to the Credit Union. While he may be convicted of uttering a forgery, he cannot, under the Grimes-Townsley rationale, also be convicted of dealing in stolen property.

Certainly the evidence in our case indicates that the Respondent, Jo Ann Camp, was the thief and she made a personal terminal use of the stolen check or checks in question by negotiating the check to pay a personal debt.

The 1st District Court of Appeals also cited the Grimes decision for its "personal use" doctrine. Wherein in Grimes, the Court stated:

> "Evidence of theft only, with the intent personally to put the stolen items or items to normal use, constitute only the crime of theft and not the crime of trafficking or dealing in stolen property...even if the normal use is achieved by some form of transfer, distribution, dispensation or disposition of the item.

The rationale in Dixon, supra, appears convoluted and inconsistent with the Court's prior decisions. We suggest that Justice Erwin's dissent is better reasoned and follows the consistency and rationale of the Grimes-Townsley "personal use" doctrine and the obvious intent of the Florida legislature.

The Dixon, supra, decision has plagued the Court with others accused of dealing stolen property, advancing the argument that because their acts of transfer or attempts to transfer did not have the effect of placing the stolen property in the "stream of commerce" they could not be convicted of dealing in stolen property. Bailey v. State, 15 FLW 1049 (1st DCA, April 19, 1990). We suggest that the Court in advancing that the essence of "trafficking" the distribution of the stolen property into the "stream of commerce" was an unfortunate attempt to legislate a new definition for "trafficking" not contemplated by the Florida legislature. Unfortunately, what the Court may have done was exactly what they wished to avoid in Townsley, wherein the Court stated: "We decline to contort the definition of trafficking", Townsley, supra at 1074.

CONCLUSION

It is the Respondent's position that the evidence clearly indicates that while working as a bookkeeper she stole money from her employer by passing checks without authorization and used them to pay her personal credit card debt. This activity though egregious, does not give rise to the charge of dealing in stolen property as contemplated by the legislative enactment of Florida Statute 812.019 (1989), but is evidence of theft under §812.014, Florida Statute (1989). Her conduct of stealing the checks and negotiating them to pay her personal credit card debt falls clearly within the "personal use" doctrine which contemplates that transfer of the stolen property incidental to its normal and intended use does not raise the crime from theft to dealing in stolen property.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing had been furnished this 8th day of January, 1991, by U.S. Mail to DAVID S. MORGAN, ASSISTANT ATTORNEY GENERAL, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114.

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