IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

COREY L. STEPHENS,

Respondent.

CASE NO. 78,872

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of Case and Facts set out in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

In Point I herein Mr. Stephens argues the district court was correct in ruling that entering an automobile with the intent to steal it is not a burglary. As the district court pointed out, Florida's burglary statute requires that the entry be made with intent to commit an offense "therein". It would seem unlikely that the legislature intended virtually every car theft committed without a tow truck to be considered both a grand theft and a burglary.

In Point II, Respondent argues that the trial court correctly granted his motion for judgment of acquittal. The State alleged in the information that a burglary occurred in Seminole County while the proof at trial showed the offense occurred in Volusia County. The State's contention on appeal -- that a burglary is still in progress as long as a car thief "remains in" a stolen car -- is illogical and clearly beyond the intention of the legislature.

ARGUMENT

POINT I: THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The District Court certified the following question in this case:

> IS BURGLARY OF A CONVEYANCE PROVED WHEN THE EVIDENCE SHOWS THAT THE ACCUSED ENTERED THE CONVEYANCE FOR THE SOLE PURPOSE OF STEALING IT, RATHER THAN COMMITTING SOME OTHER OFFENSE THEREIN?

State v. Stephens, 16 FLW 2686 (Fla. 5th DCA October 17, 1991). The majority of the district court answered the question in the negative, in a decision Respondent contends this Court should affirm.

Section 810.02(1), Florida Statutes (1989) defines burglary as follows:

> "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain. (Emphasis added).

The certified question boils down to whether a person who enters a car to steal it is entering with the intent to commit an offense therein. It is a difficult question. Either party can point to absurd results which would flow from the position advocated by its opponent. As the district court put it:

> Under the rationale of Dalby and the dissent herein, a person who steals a car by driving it away after the owner leaves the key in the ignition is guilty

> of two felonies (grand theft and burglary), whereas a person who steals that same car by towing it away with a wrecker is guilty only of grand theft. Surely, that bizarre result was not intended by the legislature.

State v. Stephens, 16 FLW D1512 (Fla. 5th DCA June 6, 1991).

On the other hand Respondent must acknowledge that his position could mean that one who breaks into a car to steal a tape deck is guilty of the two offenses (burglary and theft) while one who takes the whole car, tape deck and all, is guilty of grand theft alone.

Either side can argue for the so-called "plain meaning" of the statute. While the State points out that the burglar stealing a car is himself entirely within the car, Mr. Stephens can counter that an offense which requires moving the car can't be committed within the conveyance itself. Both sides can cite case law -- State v. Dalby, 361 So.2d 215 (Fla. 2d DCA 1978) for the State, and State v. Stephens, 16 FLW D1512 (Fla. 5th DCA June 6, 1991), for the Respondent.

In the end however, this Court should affirm the district court's decision for two reasons. First, because the intent of the legislature is controlling when interpreting a statute, this Court should affirm because there is no evidence that the legislature intended virtually every car theft to be considered also a burglary. This Court can take judicial notice of the fact that auto thefts are usually accomplished by driving the vehicle away and that when caught the thieves are not usually charged with burglary. These facts are also within the common

experience of state legislators. It is fair to assume that had the legislature intended the current burglary statute be used in such an uncommon and counter-intuitive fashion, it would have said so more clearly.

The second reason for affirmance is simply that, since the question presented can be argued effectively either way, this Court should construe the statute in the way most favorable to the accused, as is required by statute and case law. Section 775.021(1), Fla.Stat. (1989); Carawan v. State, 515 So.2d 161 (Fla. 1987).

This Court should answer the certified question in the negative and hold that stealing a car is grand theft auto, as most of us have assumed all along.

POINT II: THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION FOR JUDGMENT OF ACQUITTAL ON THE GROUNDS THAT VENIRE WAS IMPROPER.

The ground for affirmance discussed in Point I herein was first raised by the district court of appeal, not by the parties or the trial judge. The trial court granted a motion for judgment of acquittal because the information alleged a burglary in Seminole County while the proof showed the offense occurred in Volusia County. The trial court's action was entirely proper, therefore the district court's decision could be affirmed without addressing the certified question, should this Court choose to do so.

According to the testimony of State witnesses the "conveyance" involved in this case, a red Firebird, was broken into and stolen in Volusia County, then driven into Seminole County. Stephens motion for judgment of acquittal argued that the offense was committed wholly within Volusia County where he allegedly entered the car with intent to steal it. The court granted the motion after trial.

First, it was entirely proper for Stephens to wait until the State's case was complete to argue that venue was improper. Where the information alleges the wrong venue (as opposed to no venue at all) there is no requirement to raise the issue before trial. Tucker v. State, 459 So.2d 306 (Fla. 1984); Crittendon v. State, 388 So.2d 1088 (Fla. 1st DCA 1976).

It is also important to note that Stephens does not

claim that the circuit court in Seminole County had no jurisdiction to try the burglary charge. The offense arose out of the same circumstances as other offenses which clearly did occur in Seminole County, therefore jurisdiction was not the problem. The trial could have been held in either Volusia or Seminole County provided that the correct venue was alleged in the information. Stephens didn't argue that he could not be tried in Seminole County, he argued that the State's allegation that a burglary occurred in Seminole County was not proven, therefore a motion for judgment of acquittal should be granted. The court properly granted that motion.

Before this Court the State argues not only that a car theft is a burglary (See Point I) but that that burglary is still in progress as long as the thief is still in possession of the automobile. The argument is based on the fact that the burglary statute defines the offense as "entering or remaining in a structure or conveyance with the intent to commit an offense therein, ..." § 810.02(1), Fla.Stat. (1989). As long as the burglar "remains in" a stolen car, the argument goes, the burglary is still in progress.

The problem with this argument is that it relies on an illogical assumption as to what the legislature intended when it included the "remaining in" language in the statute. The logical reason for the language is that the legislature wanted to cover the situation where a person enters a structure or conveyance with permission but remains without permission with intent to

commit a crime. Commonly this would include situations where an invitee refuses to leave or hides on a premises after the owner believes everyone has left. This is the most logical interpretation of the statutory language. In fact even Judge Sharp's dissenting opinion in the district court concedes that, "... all of the Florida cases dealing with the 'remaining in' language of the statute concern fact situations where the entry was lawful, but the defendant's remaining later became unauthorized or unlawful." State v. Stephens, 16 FLW at D1514. There is no other rational reason for the "remaining in" language. Surely the legislature did not include the language out of a desire to extend venue.

Judge Sharp's dissent suggests that Mr. Stephens' interpretation could lead to a bizarre loop-hole:

> ... it would also preclude a burglary conviction in the situation where a defendant unlawfully enters with no intent to commit a crime, but after unlawfully remaining therein, develops the necessary criminal intent.

Id.

But how could this happen? And if a criminal defendant argued that this happened, what judge or jury would believe him? This situation was clearly never a concern of the Florida legislature. They defined burglary as entering or remaining not entering and remaining. Once an illegal entry has been made with the required intent the "remain in" language is clearly superfluous.

It is important to note that this case does not present a situation where the State's tortured interpretation of the

burglary statute would have been necessary to proceed with an orderly prosecution. All the prosecutor had to do was allege that the burglary occurred where his witnesses said it occurred, in Volusia County. Jurisdiction was still proper in Seminole County, as was discussed earlier. In fact the information could have been amended at anytime before trial, and perhaps even during trial, without prejudice to either party. There is no policy reason for this Court to hold anything other than what is intuitively obvious -- that burglary of a conveyance occurs where the automobile is burglarized.

CONCLUSION

BASED UPON the foregoing arguments and the authorities cited herein, Appellant respectfully requests that this Honorable Court affirm the decision of the Fifth 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 has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Corey L. Stephens, c/o Mr. & Mrs. Rackand, 7720 Ravenna Ave., Orlando, FL 32785, this 16th day of December, 1991.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER