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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE JONES,

Petitioner,

v. CASE NO. 78,904

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

Issue I: The State submits that the crimes of attempted burglary and possession of burglary tools are separate and distinct crimes. Accordingly the Petitioner was properly convicted of both and affirmance is warranted.

Issue 11: Petitioner contends that he received an illegal sentence. Petitioner claims that his sentence of 30 months imprisonment followed by 5 years probation exceeds the statutory maximum. This issue was never raised, argued, or ruled upon by the appellate court below. Accordingly, this issue is procedurally barred.

ARGUMENT

ISSUE I

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT CONVICTIONS FOR BOTH ATTEMPTED BURGLARY AND POSSESSION OF BURGLARY TOOLS.

Petitioner contends that he can not be convicted of both attempted burglary and possession of burglary tools. Petitioner claims that both offenses arose out of the same criminal act and that all of the elements of attempted burglary are subsumed and contained in the offense of possession of burglary tools. The State strongly disagrees.

Section 810.02, Fla. Stat. (1985), proscribes the offense af burglary and states:

> 810.02. Burglary
>
> (1) "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.

An attempt to commit a crime, as defined by the Florida Supreme Court in Gustine v. State, 86 Fla. 24, 26, 97 So.2d 207, 208 (1923), as:

> Generally, there must be an intent to commit a crime, coupled with an overt act apparently adapted to effect that intent carried beyond mere preparation but falling short of execution of the ultimate design.

Therefore, the offense of attempted burglary requires, as its elements, (1) a specific intent to commit the crime of burglary and (2) an overt ineffectual act done towards its (the burglary's) commission. See Groneau v. State, 201 So.2d 599 (Fla. 4th DCA 1967).

Possession of Burglary tools, on the other hand, is defined as follows:

> 810.06 Possession of burslary tools - Whoever has in his possession any tools, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree....

The State must prove beyond a reasonable doubt not merely that the accused intended to commit a burglary while he had tools in his possession, but rather that "the accused actually intended to use those tools to perpetrate the crime." Thomas v. State, 13 F.L.W. 464, 465 (Fla. August 18, 1988). Therefore, the offense of possession of burglary tools requires the State to prove that the defendant committed an overt act, not towards the commission of a burglary as required by the overt at in the offense of attempted burglary, but rather that the defendant's actions showed that "he or she was preparing to use the tool to commit a burglary or trespass." Thomas v. State, supra, 13 F.L.W. at 465. (emphasis added). The "overt act" requirement of the two crimes is therefore totally different, and the offenses are not the same

for the purposes of double jeopardy as announced in Blockburger v. United States, 284 U.S. 299 (1932).[1]

This assertion is supported by this Court's opinion in Thomas, supra. In Thomas, this Court was called upon to determine under what circumstances the possession of common household items may be criminalized under the burglary tool statute.[2]

In holding that the distinctions between common and uncommon tools were unnecessary, this Court focused on whether the actions of the accused showed that he was preparing to use the tool to commit a burglary or a trespass. It was in this context that this Court turned to the theory of attempts to resolve the question; i.e. what overt act was necessary to show an intent to use a tool to commit a burglary, short of the actual use of the tool. Ultimately, this Court concluded that the overt

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1 The Supreme Court of Florida, in Borges v. State, 415 So.2d 1265 (Fla. 1982), adopted the test in Blockburger v. United States, 284 U.S. 299 (1932) to determine whether the offenses were separate and discrete, that is, whether each statutory provision required proof of an additional fact which the other did not. See, Section 775.021(4), Florida Statutes. In doing so, the Borges Court specifically found that possession of burglary tools was not a lesser included offense of burglar. Borges, supra, 415 So.2d at 1267.

2 Prior to the Thomas decision, a distinction was made between common household items and "per se" burglary tools. When an accused was charged with possessing a common tool, used to commit a burglary or a trespass while the possession of "per se" burglary tool necessitated only the proof of intent to sue the tool. Foster v. State, 286 So.2d 589 (Fla. 1973), receded from on other grounds, Jenkins v. Wainwright, 322 So.2d 477 (Fla. 1975); Crosby v. State, 352 So.2d 1247 (Fla. 2d DCA 1977; Florida Standard Jury Instructions in Criminal Cases at 138.

act from which Thomas' requisite intent might be inferred was his activity; in running away from the police while wearing a pair of socks over his hands and carrying a screwdriver. Once caught, Thomas admitted that he had been in the area to commit a burglary, but had been arrested before being able to perpetrate it.

The facts of the instant case are strikingly similar with regard to the possession of burglary tools count. The defendant in Thomas was found by the police hiding in bushes and attempting to hide gloves and a screwdriver. When arrested, the defendant admitted his intention to commit a burglary, but stated that he hadn't accomplished it. Petitioner however, went one step further than the defendant in Thomas. He was actually seen attempting to pick the lock of the victim's door. This, the State submits, was the second distinct overt act needed towards the offense of attempted burglary. Essentially, the overt act necessary for the offense of attempted burglary was one which had to rise to a higher level than the overt act necessary for the determination of intent to use tools in the perpetration of a burglary. Certainly, by his actions of trying to hide himself and his tools, the first overt act, the defendant in Thomas would have been guilty of possession of burglary tools under Thomas even if he hadn't actually used the screwdriver. On the other hand, had the defendant not actually used the screwdriver to break the window, he could not have been found guilty of attempted burglary. After all, the use of burglary tools is not

necessary to commit a burglary or even an attempted burglary and, as the Thomas Court held, actual use of the tool is not required for a conviction under Section 810-06, Florida Statutes.[3] See, Borges, supra.

In its opinion below the Second District Court of Appeal found that attempted burglary and possession of burglary tools are separate offenses using the following analysis:

> A person may be convicted of and sentenced for separate offenses committed during one criminal transaction or episode subject to certain enumerated exceptions. §775.021(4), Fla. State. (1989). Section 775.021(4), Florida Statutes (1989) provides that "offenses are separate if each offense requires proof of an element that the other does not. . . ." a court must analyze the elements of the offense without regard to the double jeopardy question. State V. McCloud, 477 So.2d 939, 941 (Fla. 1991) (quoting §775.021(4), Fla. Stat. (Supp. 1988)).
>
> Elements of attempted burglary are as follows: (1) that the defendant did some act toward committing the crime of burglary that went beyond just thinking or talking about it and (2) that the defendant would have committed the crime except that someone

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[3] The State submits that the Thomas Court's statement at 465, that the burglary tool statute essentially criminalizes an attempt to commit a burglary through the possession of tools coupled with the intent to use those tools in the commission of the burglary, merely refers to the crime of attempted burglary in the sense that a burglary is the ultimate goal, but need not be carried out, for one to be convicted under 810.06. Figuratively speaking, one who intends on using burglary tools intends on committing a burglary, and in the sense that it need not be completed, the burglary is merely "attempted."

prevented him from committing the crime of burglary or that he failed.[4] Jones v. State, 492 So.2d 1124 (Fla. 3d DCA), review denied, 501 So.2d 1282 (Fla. 1986); see also Fla. Std. Jury Instr. (Crim.) at 55, (Attempt to Commit Crime). The elements of possession of burglary tools are: (1) the defendant had in his possession a tool and (2) the defendant had a fully-formed, conscious intent that the tool would be used by him or someone else to commit a burglary.[5] Estevez v. State, 189 So.2d 830 (Fla. 2d DCA 1966), cert. dismissed, 200 So.2d 807 (Fla. 1967); see also Fla. Std. Jury Instr. (Crim.), at 128, (Possession of Burglary Tools). Each offense, therefore, has an element which the other does not. Thus, attempted burglary and possession of burglary tools are separate offenses for which Jones may receive dual convictions and sentences unless one of the exceptions enumerated in section 775.021(4)(b) applies.

Section 775.021(4) contains three exceptions. The first exception applies when offenses require identical elements of proof. As shown above, these offenses have different elements of proof. The second exception is relevant when offenses are degrees of the same offense. This also is inapplicable. The third exception applies to "[o]ffenses which are lesser offenses the statutory elements of which are subsumed by the greater

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[4] The third District, in Ghent, lists the elements for attempted burglary as:

> 1) the intent to commit burglary; and 2) some overt act committed to effect that intent.

[5] The third District, in Ghent, lists the elements for possession of burglary tools as;

> 1) the intent to commit burglary; 2) some overt act committed to effect that intent; and 3) possession of burglary tools.

> offense." This exception also is inapplicable because one offense is not subsumed by the other in that they are both third-degree felonies; therefore, there is no "lesser" or "greater" offense. We conclude from this analysis that the offenses of attempted burglary and possession of burglary tools are separate offenses.
>
> Jones v. State, 16 F.L.W. 2739 [2nd DCA Opinion filed October 25, 1991

See also Morgan v. State, 596 So.2d 792 (Fla. 4th DCA 1991) [No double jeopardy violation where defendant is convicted of attempted burglary, possession of burglary tools, and criminal mischief].

In conclusion, the State submits that the crimes of attempted burglary and possession of burglary tools are separate and distinct crimes, By enacting Section 810.06, Florida Statutes, the legislature specifically sought to prohibit the use of devices to further burglaries and trespasses; separate evils. Accordingly the Petitioner was properly convicted of both and affirmance is warranted.

ISSUE II

WHETHER THE TRIAL COURT IMPOSE AN ILLEGAL SENTENCE.

Petitioner contends that he received an illegal sentence. Petitioner claims that his sentence of 30 months imprisonment followed by 5 years probation exceeds the statutory maximum.

The State asserts that the instant appeal is being considered by this Court because the Second District Court of Appeal in its opinion expressed conflict with other districts on the first issue in this appeal. The second issue in this appeal was never raised, argued, or ruled upon by the appellate court below. Jones v. State, 16 F.L.W. 2739 (2nd DCA, Opinion filed October 25, 1991). Accordingly, this issue is procedurally barred.

CONCLUSION

Based upon the foregoing arguments and citations of authority, he State urges this Court to affirm the judgment and sentence rendered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Kevin Briggs, Assistant Public Defender, P. O. Box 9000 Drawer PD, Bartow, Florida 33830, on this 3rd day of January, 1992.

OF COUNSEL FOR RESPONDENT