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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.: 79,013

WILLIAM LAWRENCE COWHIG,

Respondent.
_____/

INITIAL MERITS BRIEF OF RESPONDENT

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STATEMENT OF CASE AND FACTS

Respondent was tried and convicted of both a burglary of a structure and dealing in stolen property pursuant to Section 812.019(1), Fla. Stat. (1989). Respondent appealed his convictions to the Fifth District Court of Appeals addressing several issues. That court reversed Respondents conviction for dealing in stolen property based on their decision in State v. Camp 579 So.2d 763 (Fla. 5th DCA 1991) which opinion is set out in its entirety in Petitioners Appendix.

Respondent allegedly stole numerous checks from the victim's law office and subsequently passed on of those checks for cash for his own personal use. The State charged only burglary and dealing in stolen property. Not theft, forgery or uttering a forged instrument.

SUMMARY OF ARGUMENT

This issue in this case is whether or not the actions of the Respondent in cashing a check which he stole to obtain money for his own personal use constitutes dealing in stolen property pursuant to Section 812.019 Fla. Stat. (1989). This issue has been settled in the negative by this court in the recent case of State v. Camp 17 FLW S230 (April 9, 1992). The dealing in stolen property statute is not susceptible to the interpretation that a thief's personal use of a check he stole is a violation of that statute.

ARGUMENT

PERSONAL USE OF A STOLEN CHECK BY THE THIEF OF THE CHECK DOES NOT CONSTITUTE THE CRIME OF DEALING OR TRAFFICKING IN STOLEN PROPERTY PURSUANT TO SECTION 812.019, FLORIDA STATUTES(1989).

The Petitioner has addressed the issued involved in this matter in two points, both of which are directed at the statutory construction of the dealing in stolen property statutes. It appears to the Respondent that both of Petitioner's points revolve around the same issue; the question of whether or not the dealing in stolen property statute can be interpreted to include the personal use of a stolen check by the thief who stole the check. The Respondent agrees with the Petitioner that the rule of "strict construction" of penal statues is fundamental, but that rule has been misapplied by the Petitioner in its arguments herein. The rule of strict construction is not a rule which broadens the term or definition of "trafficking" in Florida Statue, Section 812.019 (1989) beyond that which is intended by the Florida Legislature. Rather the rule should be applied to strictly limit what acts can be construed as trafficking to those acts which were contemplated by the Florida Legislature in enacting the legislation.

The issue in this case is identical to the issue raised in State vs. Camp, 17 FLW S230 (April 9, 1992). In fact the Petitioner previously moved this court to consolidate the instant case with the Camp case on March 23, 1992. In Camp this court declined to adopt the Petitioner's suggested interpretation of the

dealing in stolen property statue and stated that, "...negotiating stolen checks for personal use, or otherwise deriving personal benefit from stolen merchandise, does not constitute the crime of dealing in stolen property as envisioned by the Legislature enacting Section 812.019." Camp at S231. In the instant case the Respondent was charged with burglarizing the victim's law office and stealing checks from that office. The Respondent was also charged with dealing in stolen property by taking one of those checks and passing it for cash. It would appear that the check had been forged, but neither forgery or the theft of the checks were charged in the information. The facts of this case clearly indicate that the Respondent merely made personal use of the check in the manner of which it was intended to be used. The Respondent's personal use of this check can not constitute dealing in stolen property.

Respondent's position is based on the statutory interpretation to be applied to the "FLORIDA ANTI-FENCING ACT" contained in Chapter 812, Florida Statutes (1989). This court reiterated the importance of the rule of strict construction in Perkins v. State, 576 So.2d 1310, 1312, 1313 (Fla. 1991).

> 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 statues are applied in their strict sense, not if the courts use some minor vagueness to extend the Statues' breadth beyond the strict language approved by the legislature. To do otherwise would violate the separation of powers. Art. II, Section 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 statues shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused. (Emphasis Added)
> Section 775.021(1), Fla. Stat. (1987).

The State is asking this court to define the term "trafficking" in an extremely broad sense to include any form of transfer of property. The State's interpretation of the word "traffic" would serve to make a thief's use of stolen cash a dealing in stolen property crime. Clearly this was not the intent of the legislature in enacting the dealing in stolen property statute. The State relies on Dixon v. State, 541 So.2d 637 (Fla. First DCA 1989) for the proposition that the thief that 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. This court disapproved the Dixon decision in Camp.

The Fifth District Court of Appeal in Cowhig v. State, 16 FLW D1920 (Fla. 5th DCA July 25, 1991) reversed the Respondent's conviction for dealing in stolen property on the authority of its decision in State v. Camp, 579 So.2d 763 (Fla. 5th DCA 1991). The Fifth DCA's Camp decision properly applied the concept strict construction by limiting the definition of "trafficking" in Section 812.019 Florida Statutes (1989). The Court properly applied the limitations which naturally would apply to an anti-fencing and anti-dealing in stolen property statute as articulated in the legislative history of Section 812.019 Florida Statutes (1989). As stated in Camp:

> 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

1. Commitee 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.

> 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 activities, and that the law should be focused on the criminal system that redescribes 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 (Section 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 (Section 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.

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 Appellant 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 enough 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 Statues, even if the normal use is achieved by some form of transfer, distribution, dispersion or disposition of the item.

Respondent contends an interpretation of the dealing in stolen property statute to include the use of a stolen check to

obtain cash by the thief would be to contort the definition of trafficking. The evil the State would desire to address as dealing in stolen property is properly addressed by the theft statute. The State is attempting to cause the dealing in stolen property statute to encompass numerous aspects of the theft statute. In the State's Brief they contend that to not interpret Section 812.019, Florida Statute (1989), to include the acts committed by the Respondent would be to render Section 812.012 (7)(a) purposeless. Respondent contends that the above referenced Section is specifically intended to address the thief's selling of stolen property to a fence rather than the thief's use of the stolen property for his or her own personal purposes. This courts decision in State v Camp is dispositive of this issue.

CONCLUSION

It is the Respondents position that the only interpretation of the evidence favorable to the State is that the Respondent was the thief of the stolen check and that the Respondent passed the stolen check to obtain cash for his own personal use. This activity, although criminal, does not constitute the crime of dealing in stolen property as contemplated by the legislative enactment of Florida Statue 812.109 (1989). Respondent's act of negotiating the check falls within the "personal use" doctrine which contemplates that the transfer of the stolen property incidental to its normal and intended use does not give rise to the crime of dealing in stolen property.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by delivery to The Honorable David S. Morgan, Assistant Attorney General, 210 Palmetto Avenue, Suite 447, Daytona Beach, Florida, this 4th day of June, 1992.

Gary W. Tinsley

GARY W. TINSLEY, ESQUIRE