047

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 82,539

11/24

THOMAS BAKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE DISTRICT COURT
FIRST DISTRICT, OF THE STATE OF FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

On Discretionary Review
from a Certified Question of
Great Public Importance from
the First District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner, Thomas Baker, was the Appellant before the First District Court of Appeal and the Defendant in the Circuit Court. Respondent, the State of Florida, was Appellee before the First District Court of Appeal and the prosecuted Petitioner in the Circuit Court. The Statement of the Case and Facts in the opinion of the First District is a fair and accurate description of the relevant facts for this cause. Consequently, Petitioner will refer only to those facts without any specific references to the record in this case.

STATEMENT OF THE CASE AND FACTS

This cause is before the Court pursuant to the following question of great public importance:

> "IS PROOF OF A CRIMINAL MISCHIEF TO A DWELLING (A BROKEN WINDOW) COMMITTED WHILE ON THE CURTILAGE IN A STEALTHY MANNER A BURGLARY UNDER SECTION 810.02, FLORIDA STATUTES, GIVEN THE LEGISLATIVE INTENT OF SECTION 810.02 AND THE COMMON LAW OF BURGLARY COMMITTED ON THE CURTILAGE?"

The First District's opinion described the following relevant facts (See Appendix I, opinion of First District Court of Appeal for references to the following statement of facts). The State filed an Information alleging that Petitioner unlawfully entered or remained in Robert Wilson's dwelling with the intent to commit an unspecified offense. On the day in questions, Joy Ellis, Mr. Wilson's next-door neighbor, was sitting in her living room around the noon hour when she heard a burglar alarm sound at the Wilson residence. Within 3 or 4 seconds after hearing the alarm, she looked out a window and saw Petitioner come around the far side of the Wilson house riding a bicycle. Mrs. Ellis testified that the Wilson house was hidden from the road, located in front by trees and shrubs. A 6 foot privacy fence separated the Ellis and Wilson residences. Mrs. Ellis described the area where she had seen Petitioner as containing shrubbery and a small pathway. Ellis further related that Petitioner proceeded around the front of the Wilson home and down the driveway to the street.

Ellis' testimony was corroborated by the testimony of her 20 year old daughter, Angela, who also heard the alarm and

went to the window in time to see Petitioner emerge from the far side of the Wilson home on a bicycle. Like her mother, Angela Ellis did not see Petitioner jump the fence nor enter Wilson's house.

After hearing the burglar alarm and seeing Petitioner departing the Wilson premises, Joy Ellis called the Neptune Beach Police Department to report the matter and give a description of the person she saw hurrying away. Officer William Jones responded to the call and preliminary investigation at the scene revealed that a window had been broken. Another officer, Richard Pike, was also dispatched to investigate and within two or three minutes of receiving the dispatch describing Petitioner, Pike stopped Thomas and returned him to the scene where he was identified by Joy Ellis as the man she had seen a few minutes earlier riding a bicycle away from the Wilson home moments after the burglar alarm sounded. Further investigation at the scene by Officer Pike revealed that the lower panel of a window in the back of Wilson's house had been smashed. Next to the broken window lay a window screen and a piece of wood two inches thick, 10 inches in width and 14 inches long. On this piece of board were glass fragments. Similar pieces of wood were found under a plastic tarp at the front of the house. Officer Pike also noted a chain-link fence surrounding the backyard of the Wilson residence.

At the conclusion of the State's case at trial, Petitioner moved for a judgment of acquittal on the following grounds:

> (1) The State failed to prove the house allegedly burgled was owned by Robert Wilson;

> (2) The State failed to prove Petitioner's intent to commit an offense and there was no proof of stealthy entry; and
>
> (3) There was insufficient proof of burglary because there was no showing that Petitioner entered the dwelling.

After hearing argument, the trial court denied Petitioner's Motion for Judgment of Acquittal. As to the first basis for acquittal, the court concluded that the evidence, when taken in the light most favorable to the State, was sufficient to establish ownership. Similarly interpreted, the court found the evidence sufficient to establish stealthy entry:

> "This did occur around the side towards the back of the house in an area that was secluded not only by fences, but by shrubs as well. I looked at the photographs in evidence and {I am} relying on them. Also you can tell that's an area that would be secluded, someone trying to sneak in would pick an area like that. It is pretty apparent as to the location of the window in relation to the surrounding area. Also the fact that the man who has been identified as this defendant did flee the scene as soon as the alarm went on, the alarm that the neighbors heard. That also is going to stealthy entry. Fleeing the scene on the bicycle when the alarm went off, the fact the window was broken out with a piece of wood, all of those facts and the rest of the circumstances on the record add up to the stealthy entry in this court's opinion in the light most favorable to the state."

As to the third basis of acquittal, the trial court found that there was circumstantial evidence that the defendant entered the

house when breaking the windowpane with the block of wood found beside the broken window.

The defense called no witnesses and the case was argued to the jury. The State argued that entry was made by Petitioner using the block of wood; it was up to the jury to decide whether the circumstantial evidence was sufficient to prove completed entry or only attempted burglary. After argument, the trial court instructed the jury, including in such instructions the standard jury instruction defining "structure" as "any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure." (Emphasis added).

Petitioner was found guilty of burglary as charged in the information. Thereafter he filed a Motion for Judgment of Acquittal and Motion for New Trial. At the hearing on these motions, the State argued for the first time that Petitioner could be convicted of burglary for entry into the curtilage. The trial court denied the motions and Petitioner was subsequently sentenced to 30 years in prison as a habitual felony offender.

SUMMARY OF ARGUMENT

The decision of the First District Court of Appeal could lead to patently absurd results and will be contrary to legislative intent. The First District ruled that a mere stealthy entry onto the curtilage (coupled with the act of criminal mischief of breaking a window to a dwelling) was a burglary, despite the complete lack of proof of the intent to commit a crime inside the dwelling (there was no proof of any entry into the dwelling) or on the curtilage (for example, a theft of an object from the curtilage).

In the decision below, Judge Ervin dissented and held that the common law of burglary and legislative intent did not make mere stealthy entry on to the curtilage a burglary - there must be some proof of entry into the dwelling or a crime committed on the curtilage itself. This Court should adopt the well-reasoned opinion of Judge Ervin for the reasons stated in this brief. If this Court adopts the majority opinion, then grossly absurd results will occur. For example, a juvenile stealthily enters the curtilage of a home to throw the proverbial rock or egg at a house as a prank or act of criminal mischief. Under the decision below, this act would be a burglary and a second degree felony. If the juvenile threw the rock or egg from just an inch or two outside the curtilage, then the act would be criminal mischief; a second degree misdemeanor.

ARGUMENT

ISSUE I

MERE ENTRY ONTO THE CURTILAGE OF A DWELLING HOUSE IN A STEALTHY MANNER AND COMMITTING A CRIMINAL MISCHIEF AGAINST A DWELLING WITHOUT ENTERING THE DWELLING OR COMMITTING A CRIME ON THE CURTILAGE IS NOT BURGLARY.

A. The issue in this cause: The decision of the First District leads to patently absurd results.

1. The issue as decided by the First District - the majority and dissenting opinions.

At first glance, this cause looks like a routine burglary case. Someone enters the curtilage in a stealthy manner and breaks a window to a dwelling. However, there is no proof that the individual entered the dwelling and there is no proof of an intent to commit a crime inside the dwelling, except for the evidence of the stealthy entry. In this cause, the State did not allege that Petitioner entered the curtilage in a stealthy manner. Florida courts have held that it is not necessary to make such an allegation. See L. S. v. State, 464 So. 2d 1195 (Fla. 1985); State v. Waters, 436 So. 2d 66 (Fla. 1983). A trier of fact can rely upon the stealthy entry as a presumption that the

individual who so entered intended to commit a crime. The standard jury instruction for burglary states:

> "Proof of the entering of a structure stealthily and without the consent of the owner or occupant may justify a finding that the entering was with the intent to commit a crime if, from all the surrounding facts and circumstances, you are convinced beyond a reasonable doubt that the intent existed."

The State did not allege a specific crime which Petitioner intended to commit - the Information merely alleged that Petitioner intended to commit some offense. Florida courts have held that such an allegation is unnecessary. See State v. Waters, supra. The Information also did not allege that Petitioner committed a burglary by being on the curtilage with the intent to commit a crime therein. The Information alleged that Petitioner actually entered the dwelling house by the use of the board which broke the window. The First District correctly held that there was no proof that Petitioner entered the dwelling - the entry of the board into the dwelling was not the entry of Petitioner. See Foster v. State, 220 So. 2d 406 (Fla. 3d DCA), cert. denied, 225 So. 2d 913 (Fla. 1969); W. R. LaFave & A. W. Scott, Jr., 2 Substantive Criminal Law, Section 8.13(b) (1986); C. E. Torcia, 3 Wharton's Criminal Law, Section 333 (1978); See also State v. Spearman, 366 So. 2d 725 (Fla. 2d DCA 1978). The State did not argue that Petitioner was guilty of burglary by entering the curtilage until the court considered a written Motion for Judgment of Acquittal made after the trial.

Notwithstanding the lack of allegations in the Information and argument by the State concerning a crime committed by stealthy entry onto the curtilage, the First District upheld the burglary conviction because of Appellant's stealthy entry onto the curtilage. The stealthy entry allowed the jury to infer that Petitioner entered the curtilage with the intent to commit an offense therein. The majority opinion did not rely upon the fact of the broken window - the mere entry onto the curtilage in a stealthy manner constituted the crime of burglary. However, the majority opinion did not cite a case which has held that mere stealthy entry onto the curtilage, without other proof of intent, is burglary.

Judge Ervin dissented in this case and proved, in scholarly and comprehensive opinion, that this cause is anything but a simple burglary case. Petitioner will discuss below Judge Ervin's opinion in great detail and will urge the Court to adopt it. The essence of the majority opinion is that mere stealthy entry onto the curtilage is a burglary. The opinion below also holds that the stealthy entry or any type of entry onto the curtilage to commit a crime against the house is also a burglary. While these holdings may comport with the literal language of the burglary statute, they violate legislative intent and lead to patently absurd results.

2. The decision of the First District leads to absurd results.

The literalist and inflexible interpretation of the burglary statute by the majority opinion will lead to absurd results. Petitioner will now present several very real possibilities for burglary prosecutions under the construction of the majority opinion. For example, several juveniles are playing hide and seek (during the day or night) - one juvenile jumps a fence and hides behind a house. This juvenile has committed burglary by entering the curtilage in a stealthy manner. See Irvin v. State, 590 So. 2d 89 (Fla. 3d DCA 1991), (choosing a secluded location calculated to avoid discovery). Under this example, the yard need not be fenced - under the opinion of the majority, the yard and house need only contain sufficient trees and shrubbery to permit seclusion aimed at avoiding discovery.

Assume an individual has been stopped by the police. The person then runs away from the police. The person enters the curtilage of a house in a stealthy manner to avoid detection. Under the decision below, this person has committed burglary to a dwelling, a second degree felony (15 years punishment), instead of resisting/opposing a police officer without violence, a first degree misdemeanor (1 year punishment). The decision of the First District also subsumed the commission of traditional lesser crimes like trespass, loitering and prowling into burglary. Assume an individual wishes to cross the curtilage of a dwelling to reach another designation (the traditional trespass). If the person enters the curtilage in a stealthy manner (even during the day, as in this case at noon), by hopping a fence or walking behind/between a house covered with trees and shrubs, then a burglary has

been committed. By definition, the opinion of the First District will make the actions of a "peeping Tom" (traditionally punished as trespass or prowling) a burglary because the curtilage was entered in a stealthy manner.

The decision by the majority will significantly affect the prosecution of juveniles. (Petitioner raised this argument in the Motion for Certification to this Court.) Suppose a child enters the curtilage in a stealthy manner to commit, not a crime within the curtilage (theft, for example) nor a crime inside the dwelling, but a crime against the dwelling - the proverbial thrown rock or egg against the house as a criminal mischief. This possibility (the facts of this cause) is now a second degree burglary, instead of the misdemeanors of trespass and criminal mischief. As Judge Ervin pointed out, a burglary could also be committed by a child throwing eggs/rocks through an open door/window into the dwelling, after the child entered the curtilage (no need for stealthy entry because a crime was committed inside the dwelling).

The absurdity of these real possibilities is that if a child, at night in a stealthy manner, throws a rock/egg at a house from just outside the curtilage, then only the misdemeanor of criminal mischief is committed. However, if the same child moves a few inches onto the curtilage, then a burglary is committed.

The Legislature did not intend to achieve these absurd results nor did the Legislature intend to abolish, de facto, the common law crimes of trespass, loitering/prowling and criminal mischief. Judge Ervin below currently interpreted the burglary

statute to avoid these results and give effect to legislative intent. Therefore, Petitioner will first discuss legislative intent and then Judge Ervin's solution of the problem posed by this cause.

B. The legislative intent.

The current burglary statute prohibits the entry of a dwelling with the intent to commit an offense therein. The definition of dwelling includes the curtilage of the dwelling. See Section 810.02(1), Florida Statutes. Florida courts have interpreted curtilage to mean the enclosed grounds or area immediately surrounding the dwelling. See J.E.S. v. State, 453 So. 2d 168 (Fla. 1st DCA 1984), (driveway is part of the curtilage - theft of bicycle from driveway is burglary); Tobler v. State, 371 So. 2d 1043 (Fla. 1st DCA), cert. denied, 376 So. 2d 76 (Fla. 1979), (fenced area surrounding a building). This definition is an expansion of the common law. At common law, burglary was limited to the dwelling house and buildings within the curtilage. See Jerome C. Latimer, Burglary is for Buildings, or is it? Protected Structures and Conveyances Under Florida's Present Burglary Statute, 9 Stetson L. Rev. 347 (1979). At common law it was not burglary to break the gate of a fence and enter the yard with the intent to commit a felony therein. Latimer, supra, at 350.

As Judge Ervin discussed in his dissent, the current definition of burglary (dwelling plus the curtilage) evinces an

intent to expand the common law definition of burglary. See and compare Sections 810.02(1), Florida Statutes (1971), burglary limited to versions of Section 810.02. The current definition of dwelling (including curtilage) was enacted in 1974. (Chapter 74-383, Section 30, Laws of Florida.) Petitioner agrees with this principle and does not dispute the fact that the Legislature intended to expand the common definition of burglary. However, the question in this cause is whether this attempt to expand the definition of curtilage, coupled with the stealthy entry presumption, was intended by the Legislature to create the absurd results described above?

As Judge Ervin pointed out, a reviewing court has a duty, in trying to determine legislative intent, to give a statute a construction which will avoid absurd results. Weber v. Dobbins, 616 So. 2d 956 (Fla. 1993); Vildibill v. Johnson, 492 So. 2d 1047 (Fla. 1986); Drury v. Harding, 461 So. 2d 104 (Fla. 1984). Judge Ervin also used another maxim of judicial construction - statutes in derogation of the common law are to be construed strictly - they will not be interpreted so as to displace the common law further than is clearly necessary. Carlisle v. Game and Fresh Water Fish Commission, 354 So. 2d 362 (Fla. 1977).

Petitioner suggests that there is a way to give the burglary statute full effect commensurate with legislative intent and the common law and yet avoid the absurd results caused by an expansive definition of curtilage and stealthy entry. The answer to this riddle is the phrase "enter the dwelling {or curtilage}

with the intent to commit a crime therein." The key word for this solution is "therein."

C. The correct interpretation of entering the dwelling or curtilage with the intent to commit a crime therein.

1. Entry into dwelling.

Judge Ervin correctly found the solution to the Gordian Knot problem posed by this cause - how does a court give effect to the plain language of the burglary statute without destroying legislative intent and creating absurd results? Judge Ervin wrote that:

> "I consider that when the legislature created the language in Section 810.02(1), requiring that entry within a structure or conveyance be accompanied by 'the intent to commit an offense there,' it did not intend to displace the common law rule exacting that before a burglary of a dwelling can be established, proof is essential that the defendant entered or attempted to enter the structure for the purpose of committing a crime." 18 Fla. L. Weekly D1170, 1172 (Fla. 1st DCA May 7, 1993).

Judge Ervin then found that if there is insufficient proof of an entry into the dwelling, then there could be no burglary even if the person had entered the curtilage. See State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979), (removal of hubcaps is not burglary to car - crime not committed within the car). This Court in State v. Stephens, 601 So. 2d 1195 (Fla. 1992), held that the word "therein" in the burglary statute meant

that a burglary could exist only if the defendant formed an intent to commit a crime in that place, i.e., the structure, conveyance or curtilage. See also People v. Steppan, 473 N. E. 2d 1300 (Ill. 1985), (cited by Judge Ervin to show that the term "therein" in a burglary statute requires that the intent to commit a felony coincide with the unauthorized entry."

This interpretation will eliminate the examples of mere stealthy entry or to the curtilage without any entry into the dwelling. This interpretation will also eliminate the absurd result of a possible punishment of a hide and seek game as burglary. The Legislature obviously did not intend to punish, as burglary, the mere stealthy entry onto the curtilage of a dwelling without some proof of a possible crime committed either inside the curtilage or dwelling. See Tobler v. State, 371 So. 2d 1043 (Fla. 1st DCA), cert. denied, 376 So. 2d 76 (Fla. 1979); DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978); Greer v. State, 354 So. 2d 952 (Fla. 3d DCA 1978). In each of these cases, there was proof of a potential theft. Even if there was stealthy entry and a crime committed against a dwelling, but with no proof of entry, then there still is no burglary because there was no entry into the dwelling. This Court must remember that the stealthy entry presumption is only a substitute for the intent to commit a crime. There must still be proof of entry with that intent.

2. Entry onto the curtilage.

The above analysis does not completely solve the problem with this case because the majority opinion held that the mere entry onto the curtilage in a stealthy manner was burglary. Judge Ervin addressed this problem by stating that if Petitioner committed burglary by entering the curtilage to commit criminal mischief against the house, then the burglary statute was vague and ambiguous; Judge Ervin adopted the view of Professor Latimer on this point. See Latimer, supra, at 352-53. Petitioner does not disagree with Judge Ervin's and Professor Latimer's argument on this point. Accordingly, Petitioner adopts this position. However, if this Court decides that the statutory language is not vague, then the absurd results described above will still occur. (For example, a child is convicted of burglary for entering a curtilage to throw an egg at the house.)

Petitioner again suggests that there is a way to interpret the burglary statute to avoid these results. The key to this problem is again the term "therein." The gravamen of burglary is the invasion of the possessory rights, not ownership rights of a dwelling and its curtilage. See Jackson v. State, 259 So. 2d 739 (Fla. 2d DCA 1972), affirmed and modified, 281 So. 2d 353 (Fla. 1973). For this reason, it is burglary to commit a theft from the curtilage. This act committed within the curtilage interferes with the possessory interest in objects within the curtilage of the dwelling. As with the entry of a dwelling, an entry onto the curtilage must be with the intent to commit a crime against possessory interest within the curtilage. This interpretation will eliminate the above-described possibilities of bur-

glary convictions based upon mere stealthy entry onto the curtilage without proof of any possible crime within the curtilage that is against possessory interest as opposed to ownership interest (crimes of fleeing from police, mere trespass mistaken for burglary due to stealthy entry, loitering/prowling, criminal mischief). Under this interpretation, mere entry onto the curtilage to commit a crime, not within the curtilage, but against the dwelling (without entering it), is not burglary.

This view is consistent with the Legislature's expansion of the common law. Given the way we lead our modern lives - fenced yards with living/social areas outside the home (the bicycle/toys outside in the yard, the pool, patio or barbecue grill), the Legislature intended to protect the curtilage against invasions of possessory interests. For example, the theft of a chair from the pool area would be a burglary or an assault against a person sitting by the pool or getting out of a car in a driveway would be a burglary. See State v. Musselwhite, 402 So. 2d 1235 (Fla. 2d DCA 1981); State v. Spearman, 366 So. 2d 725 (Fla. 2d DCA 1979); Joyner v. State, 303 So. 2d 60 (Fla. 1st DCA 1974).

The Legislature did not intend to make all stealthy entries onto the curtilage a burglary. Otherwise, the crime of trespass would be eliminated. This Court should avoid a construction of one statute which render another statute meaningless. See Florida Sugar Distributors, Inc. v. Wood, 135 Fla. 126, 184 So. 641 (Fla. 1938). Each applicable statute should be given a separate field of operation. See Oldham v. Rooks, 361 So. 2d 140 (Fla. 1978); Arnold v. State, 147 Fla. 324, 2 So. 2d 874

(Fla. 1941). Moreover, there has been no express repudiation of the trespass and other applicable statutes and the common law of burglary. Therefore, this Court should hold that a stealthy entry onto the curtilage must evince an intent to commit a crime, against possessory interest, within that curtilage. An entry to commit another crime, not against possessory interest (for example, resisting the police) or to commit a crime against the dwelling, without entering it, is not burglary.

D. The facts of this cause.

As Judge Ervin noted in this dissent, the facts of this cause were insufficient to sustain a burglary conviction. See Jackson v. Virginia, 443 U. S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), (constitutional standard for sufficiency of evidence). Although it is possible that Petitioner entered the curtilage and broke the window to the house in an attempt to enter the house to commit a crime inside the dwelling, it is equally possible that Petitioner entered the yard to commit criminal mischief by breaking the window. The fact that the alarm sounded and Petitioner immediately left the area is not indicative of either a burglary or criminal mischief. The commission of either offense, followed by an alarm, would result in flight from the scene.

The evidence in this case was completely circumstantial. No one saw Petitioner enter the yard or break the window. Petitioner was not carrying any tools, bags or other devices which indicated an intent to commit burglary. This evidence in this

case could support a hypothesis of guilt (entry to commit burglary) and it can also support another hypothesis of innocence (entry to commit criminal mischief). See Taylor v. State, 583 So. 2d 323 (Fla. 1991); State v. Law, 559 So. 2d 187 (Fla. 1989); Fowler v. State, 492 So. 2d 1344 (Fla. 1st DCA 1986), review denied, 503 So. 2d 328 (Fla. 1987).

Judge Ervin correctly noted that the evidence below was insufficient for burglary; Judge Ervin then concluded that Petitioner was guilty of trespass. Although the evidence clearly showed that Petitioner committed a criminal mischief, criminal mischief is not a category 1 or category 2 lessor included offense to burglary of a dwelling. Fla. Std. Jury Instr. (Crim.) 292. Therefore, for all the reasons noted above, the burglary conviction should be set aside and a conviction for trespass should be entered against Petitioner.

CONCLUSION

This Court should set aside the burglary conviction and direct that a judgment for trespass be entered against Petitioner.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, this 4th day of November, 1993.