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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 82,539

FILED
SID J. WHITE
DEC 20 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THOMAS BAKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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

LOUIS O. FROST, JR.
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STATEMENT OF THE CASE AND FACTS

Respondent accepted Petitioner's Statement of the Case and Facts.

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.

Respondent does not address the arguments made by Petitioner nor the certified question to this Court. Respondent first suggests that this Court should not exercise its discretionary jurisdiction over this case because this case is not a case of first impression nor an "unusual" one. While this case may not be "unusual," the First District certified a question to this Court because this case does represent a conflict between the recent decisions on burglary and the legislative intent of Chapter 810 and the common law of burglary. Respondent misses the issue embodied in the certified question. Respondent argues that the facts of this case clearly constitute burglary under the judicial constructions of Chapter 810. Petitioner agrees with this

position and this fact creates the issue in this case - are these judicial constructions inconsistent with legislative intent and the common law? The First District also certified the question in this case due to the possible expansion of the Burglary statute to relatively minor crimes committed by juveniles - the proverbial rock or egg hurled at a house.

This case also presents the issue of whether stealthy entry onto the curtilage is sufficient evidence of intent to commit a crime inside a dwelling. In this case, the State alleged that Petitioner entered a dwelling with the intent to commit some unspecified offense therein. At trial, the State relied upon the breaking of the window as proof of entry. (This reliance was misplaced because Petitioner did not enter the dwelling). See State v. Spearman, 366 So. 2d 725 (Fla. 2d DCA 1978).

The trial court denied Petitioner's Motion for a Judgment of Acquittal based upon: 1) Petitioner's entry into the dwelling; and 2) stealthy entry onto the curtilage. The State did not allege stealthy entry in the charge against Petitioner. This Court has held it is not necessary to make such an allegation. L. S. v. State, 464 So. 2d 1195 (Fla. 1985); State v. Waters, 436 So. 2d 66 (Fla. 1983). Consequently, as Judge Ervin noted below in his dissent, the issue in this cause is whether the legislature (through the language of Chapter 810 and the common law) intended to punish as a burglary the act of stealthy entry onto the curtilage without committing a crime inside the dwelling or on the curtilage.

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

Respondent simply does not address this argument by Petitioner. Respondent repeatedly argues that the plain language of Section 810.02 makes the offense in this case a burglary. The issue in this case is not whether the plain language of Section 810.02 covers this case, but whether the application of that plain language leads to an absurd result. Respondent ignores the rule of construction that a reviewing court will not give a statute its plain meaning if such a construction will lead to absurd results. See Weber v. Dobbins, 616 So. 2d 956 (Fla. 1993).

Petitioner reiterates his argument on this point and the examples of such absurd results listed in the Initial Brief. See Petitioner's Initial Brief, pages 9-12. Respondent insists upon a literal and mechanistic application of Section 810.02(1) without any consideration of the history of Burglary in Florida, the common law and the legislative intent.

In Britton v. State, 604 So. 2d 1288 (Fla. 2d DCA 1992), (listed by Petitioner as supplemental authority in this case), this literalist view is present. In Britton v. State, supra, the issue was whether the running into a house with the intent to hide from pursuing police officers (the defendant was arrested for sale of cocaine but escaped from the police) was burglary. Britton argued that the crime of burglary must be directed to the persons or property within the dwelling. The Second District rejected this argument because Section 810.02

prohibited the entry of a structure to commit a crime therein. The position taken by the Britton court is the position argued by the State in this cause. Therefore, the question becomes whether the legislature intended that any entry onto the curtilage to commit any crime is burglary. As will be discussed below, the legislative intent cannot be interpreted this way because such a construction will lead to absurd results and violate the common law.

B. The legislative intent.

Both parties agree that the inclusion of the curtilage as a part of the dwelling evinces legislative intent to expand the common law. The problem posed by this case is whether the legislature actually intended the absurd results described by Petitioner and Judge Ervin. Stated another way, what did the legislature intend when it expanded, in 1974, the definition of dwelling to include the curtilage? Did the legislature merely intend to expand Burglary to include crimes committed within the curtilage or did the legislature actually intend to include all entries upon the curtilage by stealthy entry or with the intent to commit any crime on the curtilage, inside the dwelling or to the dwelling?

The State and the majority decision below blithely ignore the centuries-old law that burglary is a crime of the invasion of the possessory rights, as opposed to ownership rights; burglary is a crime against the persons who possess the dwelling and its curtilage. This Court in Jackson v. State, 259 So. 2d

739 (Fla. 2d DCA 1972), affirmed and modified, 281 So. 2d 353 (Fla. 1973) accepted this proposition. Therefore, any entry onto the curtilage is not a burglary. The entry must be to commit a crime inside the dwelling or on the curtilage. Otherwise, the crime of trespass would be superfluous.

The State ignores the history of the burglary statute in Florida and at common law. The addition of the term curtilage in 1974 was obviously designed to prevent an invasion of the possessory rights of a person within the curtilage - (the driveway, patio or pool area). Given the way we lead our modern lives, the legislature simply wanted to protect individuals from crimes against persons or possessory interests on the curtilage to a dwelling. The legislature did not intend to make all stealthy entries onto the curtilage a Burglary. Otherwise, a game of hide and seek by children could be a Burglary. Respondent has not addressed Petitioner's solution to the problem created by this case - How to give the language of Section 810.02 full effect without contradicting legislative intent and creating patently absurd results?.

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

1. Entry into dwelling.

Respondent has not addressed Petitioner's argument that the solution to the problem posed by this case is an

interpretation of the phrase "therein." (To enter the dwelling or the curtilage to commit a crime therein). See State v. Stephens, 601 So. 2d 1195 (Fla. 1992). Petitioner reiterates his position that the crime of Burglary is limited to a crime, against persons or possessory interests, committed within either the dwelling or curtilage. This solution will eliminate the absurd situations created by mere stealthy entry onto the curtilage without any other proof of intent to commit a crime on the curtilage or within the dwelling. Therefore, entry onto the curtilage to commit an assault upon a person on the curtilage is Burglary. Entry onto the curtilage to commit a theft (theft of a bicycle within the yard) is Burglary. This interpretation will eliminate the mistake of making a mere stealthy entry onto the curtilage a Burglary.

2. Entry onto the curtilage.

As noted by Judge Ervin below, entry onto the curtilage to commit a crime against the dwelling is not Burglary. The crime of criminal mischief committed against the dwelling is not a crime committed on the curtilage and against the possessory interest in the curtilage. This view will eliminate a mere trespass being mistaken for a Burglary - one stealthy enters a curtilage for the purpose of crossing a yard - as in this case (entry, behind some shrubs/fence which border a curtilage).

Under Florida law the curtilage need not be fenced - the enclosed space of ground and outbuildings immediately surrounding

the dwelling. In J.E.S. v. State, 453 So. 2d 168 (Fla. 1st DCA 1984), the First District decided that the driveway in front of a dwelling was part of the curtilage. See also DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978), (pavement area outside warehouse was a part of the curtilage). If Florida courts had limited the curtilage to the fenced area around a dwelling, then the crime of Burglary would not necessarily include the crimes of criminal mischief, some trespasses and loitering and prowling.

Under the opinion below, the crimes of prowling and some trespasses have been eliminated. If a person scales a fence, to enter the curtilage, then there may be sufficient proof of a Burglary (intent to commit a crime inside the dwelling or on the curtilage). By definition, a prowling on the curtilage is done in a stealthy manner. Therefore, the prowler on the curtilage has committed a burglary under the rationale of the First District Court of Appeal. This example underscores the inherent problem with this case - the decision below effectively eliminates several common law crimes without any proof that the legislature intended such a result. However, mere entry, even in a stealthy manner, onto the curtilage should not always be a Burglary. The solution to this problem is proof of the intent to commit a crime within the dwelling or on the curtilage itself. The expansive definition of curtilage and stealthy entry have led to absurd results which are contrary to the legislative intent and the common law. If this Court adopts Judge Ervin's dissent, then the absurd results will be eliminated and the common law and the intent of the legislature will be honored.

D. The facts of this cause.

Respondent has not addressed Petitioner's argument that the facts of this cause were insufficient to sustain a Burglary conviction. Petitioner reaffirms his argument in the Initial Brief and reiterates his reliance upon Judge Ervin's opinion on this point.

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 17th day of December, 1993.