OA 6.10.94

FILED
SID J. WHITE
MAR 24 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAY ROBINSON YOUNG, :

Petitioner, :

vs. : Case No. 83,000

STATE OF FLORIDA, :

Respondent. :

_____ :

Called & requested Appendix 3-24-94

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

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

References to the record on appeal that was before the Second District Court of Appeal in Jay Robinson Young v. State of Florida, Case Number 92-01778, will be designated with an "R" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Petitioner, JAY ROBINSON YOUNG, was charged by information filed in Highlands County Circuit Court on November 1, 1991 with robbing Jimmy Taylor on September 27, 1991. (R 386-387)

By letter dated January 30, 1992, the state attorney's office informed defense counsel that it would request that Petitioner be sentenced pursuant to the habitual offender statute. (R 388) A copy of this letter was sent to Petitioner. (R 388)

This cause proceeded to a jury trial on February 14, 1992, with the Honorable J. Dale Durrance presiding. (R 5-313)

Petitioner's jury returned a verdict finding him guilty of the lesser included offense of petit theft. (R 310,390,391)

On March 9, 1992, the State served a notice upon defense counsel that it intended to have Petitioner "sentenced for Felony Petit Theft as provided in Section 810.014(2)(c), Florida Statutes." (R 392) On March 18, 1992, defense counsel filed a "Response to Notice of Intent to Sentence As Career Criminal," which alleged that one of the petit theft convictions upon which the State intended to rely was entered pursuant to a guilty plea that was not made knowingly and intelligently. (R 402-404) Also on March 18, 1992, Petitioner filed his affidavit stating that when he pled guilty in Case Number C83-910 to petit theft, he had not been advised of, and did not knowingly and intelligently waive, his "right against compulsory self-incrimination, his right to a trial where the State must prove his guilt beyond a reasonable doubt, his right to a speedy and public trial by an impartial jury, his right

to confront the witnesses against him, his right to have effective assistance of legal counsel at trial . . ." (R 396-397) Nor was he advised of "the maximum penalty that he could suffer as a result of his conviction including the fact that his conviction could be used against him in another prosecution to increase the penalty he might receive." (R 396-397)

Petitioner appeared before the court for sentencing on April 8, 1992. (R 314-358) The State introduced into evidence Petitioner's two prior convictions for petit theft, in Case Number CR80-352 and C83-910, as well as a certificate from a deputy clerk of court indicating that she had been unable to locate any evidence of post conviction relief in these cases. (R 315-316,320,423-425,430-431, 432,436-437) Petitioner's conviction in C83-910, in which Petitioner was represented by the same attorney who represented him at the trial level in the instant case, came in over defense objections that Petitioner's guilty plea was not entered knowingly and intelligently, with full understanding of the consequences. (R 316-319) Petitioner testified that he did not recall any discussion between his lawyer or the court and himself regarding the rights that he would be waiving in order for him to enter his guilty plea, nor did Petitioner have any independent knowledge about the rights he was giving up. (R 327-328) He did not understand that the petit theft to which he was pleading guilty could later be used to enhance his punishment if he was convicted of another petit theft. (R 328) Petitioner was only concerned with getting out of jail. (R 328,331) Petitioner also testified that he

did not speak with his attorney until the day he went to court and entered his plea (R 330-331,335) However, the attorney apparently filed an affidavit with his request for court-appointed attorney's fees showing that he had three conferences with Petitioner (R 339-340), although this affidavit does not appear in the record. Judge Durrance ultimately ruled that both of the prior petit theft convictions could be used to enhance Petitioner's offense to a felony. (R 344-345)

The State also presented documents at the April 8 hearing regarding its request that Petitioner be sentenced as an habitual offender, but ruling on this matter was postponed so that defense counsel could verify the date that Petitioner was released from prison. (R 347-356,426-429,433-435,438-456)

Petitioner appeared before the court again on April 21, 1992. (R 359-366) Defense counsel indicated that he had satisfied his concerns regarding the date that Petitioner was released from prison (R 360), but lodged an objection to Petitioner being sentenced for felony petit theft on the grounds of lack of notice to Petitioner that the State would proceed against him on this basis, citing Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992). (R 360-366) The court continued sentencing for another week, and offered counsel the opportunity to submit written memoranda. (R 365-366)

The prosecutor filed a written memorandum of law on April 28, 1992. (R 459-476)

Another sentencing hearing was held on April 28, 1992. (R 367-381) Defense counsel once again argued that it would constitute a due process violation to convict and sentence Petitioner for felony petit theft when he had not been so charged, to no avail. (R 368-375) The court adjudicated Petitioner guilty of felony petit theft, and initially sentenced him to five years in prison. (R 374-375) However, when the prosecutor reminded the court that the State was seeking an enhanced sentence for Petitioner as an habitual offender, the court changed his sentence to ten years in prison. (R 379-380, 478-486) The court also assessed costs against Petitioner in the amount of $260.00, and imposed an attorney's fee in the amount of $2,500.00. (R 380,477,487-488)

Petitioner timely appealed to the Second District Court of Appeal. One of the issues he raised was that the offense of petit theft for which he was convicted should not have been reclassified as felony petit theft, because Petitioner was not placed on notice that he was being prosecuted for this felony. On December 10, 1993, the Second District Court of Appeal affirmed Petitioner's conviction and sentence, citing State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1987). Young v. State, Case Number 92-01778, slip opinion at pages 1-2. The opinion stated: "We recognize that our decision in this case conflicts with Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992)." Slip opinion, page 2.

On January 7, 1994, Petitioner timely filed his notice to invoke the discretionary jurisdiction of this Court. By order

dated February 25, 1994, this Court accepted jurisdiction herein, and set a briefing schedule and a date for oral argument.

SUMMARY OF THE ARGUMENT

Principles of due process of law and this Court's decision in State v. Rodriquez, 575 So. 2d 1262 (Fla. 1991) are violated where a criminal defendant is convicted of felony petit theft upon an information which fails to allege the prior theft convictions which are essential elements of this substantive offense. The opinion of the Second District Court of Appeal in this case and in State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1987), along with the opinion of the Third District Court of Appeal in Peek v. Wainwright, 393 So. 2d 1175 (Fla. 3d DCA 1981), must be dispproved, and the opinion of the Fourth District Court of Appeal in Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992) must be approved. Petitioner Jay Robinson Young's conviction and sentence for felony petit theft must be vacated and his cause remanded to the trial court with instructions that Petitioner be adjudicated for second degree misdemeanor petit theft and resentenced accordingly.

ARGUMENT

ISSUE

WHETHER ONE MAY BE ADJUDICATED GUILTY AND SENTENCED FOR THE SUBSTANTIVE OFFENSE OF FELONY PETIT THEFT WHERE THE INFORMATION FAILS TO ALLEGE THE PRIOR THEFT CONVICTIONS WHICH ARE AN ESSENTIAL ELEMENT OF THIS CRIME?

The information the State filed against Petitioner charged him with the offense of robbery, alleging that he took United States currency from Jimmy Taylor by force, violence, assault or putting Taylor in fear. (R 386) However, Petitioner's jury convicted him not of this serious felony, but of the second degree misdemeanor of petit theft. (R 310,390,391) § 812.014(2)(d), Fla. Stat. (1991). In separate proceedings, at the request of the State, the trial judge thereafter reclassified Petitioner's conviction pursuant to section 812.014(2)(d), Florida Statutes (1991) as a felony of the third degree, and enhanced Petitioner's sentence as an habitual offender. Thus, Petitioner was ultimately sentenced to the maximum possible sentence, 10 years in prison, after his jury convicted him of an offense carrying a maximum sentence of 60 days imprisonment. § 775.082(4)(b), Fla. Stat. (1991).

Felony petit theft is a substantive offense. State v. Harris, 356 So. 2d 315 (Fla. 1978); State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1987). Section 812.014(2)(d), Florida Statutes (1991) provides in pertinent part that "[u]pon a third or subsequent conviction for petit theft, the offender shall be guilty of a felony of the third degree, punishable as provided in ss. 775.082, 775.083,

and 775.084." [1] The State did not allege in its charging document that Petitioner had two or more prior convictions for petit theft, and did not otherwise put Petitioner on notice that he could be convicted of felony petit theft.

In Peek v. Wainwright, 393 So. 2d 1175 (Fla. 3d DCA 1981), the Petitioner was seeking a writ of habeas corpus. Like Petitioner here, Peek had been charged with strong-arm robbery, but was convicted of the lesser included offense of petit theft. The trial court subsequently enhanced Peek's conviction to that of felony petit theft pursuant to section 812.014(2)(c), Florida Statutes (1980), and sentenced him to five years in prison. The Third District Court of Appeal denied habeas corpus, holding that the trial court's action was in keeping with the intent of the Florida Legislature in enacting the felony petit theft statute, and rejecting Peek's argument that he could not be sentenced for felony petit theft where he had not been charged with this offense and convicted thereof.

The Second District Court of Appeal agreed with the rationale of Peek when it decided State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1987), the case relied upon by the court to affirm Petitioner Jay Robinson Young's conviction and sentence in the instant case. Crocker had been charged with resisting an officer without violence and grand theft, but was convicted of resisting and petit theft. The State appealed after the trial court refused to allow it to

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[1] Effective October 1, 1992, habitual offender sentencing pursuant to section 775.084 was no longer available for one convicted of felony petit theft. Ch. 92-79, Laws of Florida.

attempt to establish Crocker's guilt of felony petit theft. The Second District held that the State should have been permitted to proceed against Crocker for felony petit theft after he was convicted of petit theft, even though the charging instrument did not allege felony petit theft. The Crocker court noted that felony petit theft is a substantive offense, citing this Court's decision in Harris, and agreed that when felony petit theft is the only felony with which the accused is charged, the information must make clear that felony petit theft is being charged in order to invoke the jurisdiction of the circuit court, but disagreed with Crocker's contention that prior theft convictions must be specifically alleged in the charging instrument and proved in all cases in which the defendant could be found guilty of petit theft as a lesser included offense of the crime actually charged.

In Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992), the Fourth District Court of Appeal reached the opposite conclusion from that reached by its sister courts in the earlier cases. Clay was charged with armed robbery and resisting a merchant, but was found guilty of petit theft and resisting a merchant. The appellate court agreed with Clay's argument that the trial court erred in reclassifying her petit theft conviction to grand theft when the information did not make reference to her prior theft convictions and did not charge her with felony petit theft. The Clay court found the reasoning of the court in Crocker "persuasive," but opined that it had been superseded by this Court's decision in State v. Rodriquez, 575 So. 2d 1262 (Fla. 1991). In

Rodriguez the Court was called upon to resolve the conflict between Rodriguez v. State, 553 So. 2d 1331 (Fla. 3d DCA 1989) and Pritchard v. State, 528 So. 2d 1272 (Fla. 1st DCA 1988) on the issue of "whether a charging document must specifically allege three or more prior convictions for Driving Under the Influence (DUI) when charging a defendant with felony DUI to confer jurisdiction on the circuit court and to comply with due process of law." 575 So. 2d at 1263. The Court held that the jurisdiction of the circuit court was properly invoked in the case by virtue of the State's citation to the felony DUI statute in the information. However, the Court also held that due process requires the charging document to specifically allege three or more prior convictions for driving under the influence before one may be convicted of felony DUI (although the jury is not to be informed of these allegations); the State may not wait until one is convicted of DUI and thereafter notice him that it will seek to establish felony DUI. Art. I, §§ 9, 16, Fla. Const. Most significantly, the Court discussed its opinion in Harris, which construed the felony petit larceny statute, and found the felony DUI statute to be "indistinguishable" from the felony petit larceny statute, in the sense that both laws create substantive offenses and are thus distinguishable from the sentencing provisions of the career habitual criminal statute. 575 So. 2d at 1265. The Rodriguez Court disapproved Pritchard, where the court held that an information that cited the felony DUI statute, but failed to mention any previous DUI convictions, was sufficient to support a felony DUI conviction. Notably, the

Pritchard court relied upon the Second District's opinion in Crocker for support.

The rationale of Rodriguez compels the conclusion that one may not be convicted of felony petit theft unless the State alleges the predicate prior thefts necessary to establish this substantive offense in the charging document. Peek and Crocker, as well as the opinion of the Second District Court of Appeal in Petitioner's case, must therefore be disapproved, and Clay must be approved.

At this point it might be appropriate to reflect upon the words of Judge Farmer in his specially concurring opinion in Clay. Judge Farmer noted that "[f]elony petit theft cannot logically be a lesser included offense of grand theft or armed robbery because neither of these two more serious offenses contain the element of two prior convictions for petit theft. The separate charge is therefore constitutionally required." 595 So. 2d at 1055. Judge Farmer then wrote:

> Crocker may seem more persuasive, more sensible, more accommodating to the press of business in a harried prosecutor's busy office in a crowded urban area. But constitutional requirements, such as essential notice of the precise crime sought to be charged, are not always founded wholly on logic or administrative ease. This one, for example, is rooted in fundamental fairness-on the notion that ambiguous or vague charges of crimes have sometimes been misused to punish dissent, or remove adversaries, or simply to achieve convictions when no more specific crime applies. The overriding imperatives of constitutional policy thus displace the understandable quest for procedural simplicity.

Jay Robinson Young's conviction and ten year sentence after his conviction by a jury of a second degree misdemeanor raise the

specter of judicially-assisted prosecutorial vindictiveness when the State's desire to see Young convicted of the serious felony of robbery was thwarted. His conviction and sentence for felony petit theft must not be allowed to stand.

CONCLUSION

The felony petit theft conviction and sentence of Petitioner, Jay Robinson Young, must be vacated, and his cause remanded to the trial court with instructions that Petitioner be adjudicated for petit theft, a second degree misdemeanor, and resentenced accordingly.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 22nd day of March, 1994.

Respectfully submitted,

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