IN THE SUPREME COURT OF FLORIDA

JAY ROBINSON YOUNG, :

Petitioner, :

vs. : Case No. 83,000

STATE OF FLORIDA, :

Respondent. :

_____ :

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
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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. (R386-387)

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. (R388) A copy of this letter was sent to Petitioner. (R388)

This cause proceeded to a jury trial on February 14, 1992, with the Honorable J. Dale Durrance presiding. (R5-313)

Petitioner's jury returned a verdict finding him guilty of the lesser included offense of petit theft. (R310,390,391)

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." (R392) 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. (R402-404) 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 . . ." (R396-397) 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." (R396-397)

Petitioner appeared before the court for sentencing on April 8, 1992. (R314-358) 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. (R315-316,320,423-425,430-431, 432,436-437) Petitioner's conviction in C83-910, in which Petitioner was represented by the same attorney who represented him 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. (R316-319) 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. (R327-328) 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. (R328) Petitioner was only concerned with getting out of jail. (R328,331) Petitioner also testified that he did not speak with his attorney

until the day he went to court and entered his plea.(R330-331,335) However, the attorney apparently filed an affidavit with his request for court-appointed attorney's fees showing that he had three conferences with Petitioner (R339-340), 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. (R344-345)

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. (R347-356,426-429,433-435,438-456)

Petitioner appeared before the court again on April 21, 1992. (R359-366) Defense counsel indicated that he had satisfied his concerns regarding the date that Petitioner was released from prison (R360), 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). (R360-366) The court continued sentencing for another week, and offered counsel the opportunity to submit written memoranda. (R365-366)

The prosecutor filed a written memorandum of law on April 28, 1992. (R459-476)

Another sentencing hearing was held on April 28, 1992. (R367-381) 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. (R368-375) The court adjudicated Petitioner guilty of felony petit theft, and initially sentenced him to five years in prison. (R374-375) 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. (R379-380, 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. (R380,477,487-488)

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). (Appendix, pp. 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)." (Appendix, p. 2.) The Second District Court of Appeal issued its mandate herein on January 12, 1994.

SUMMARY OF THE ARGUMENT

In State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1987), which the court cited in affirming Petitioner's conviction and sentence, the court agreed with the State and with the decision of its sister court in Peek v. Wainwright, 393 So. 2d 1175 (Fla. 3d DCA 1981) that one could be found guilty of felony petit theft and sentenced accordingly, even though the charging document did not allege any prior petit theft convictions. In Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992), the Fourth District reached a contrary conclusion, finding error in the reclassification of a petit theft conviction to grand theft when the information did not make reference to prior theft convictions and did not charge petit theft. The conflict between Clay and the other cases referred to above is clear, and requires resolution by this Court.

ARGUMENT

ISSUE

A DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE INSTANT CASE AND WITH PRIOR DECISIONS OF THE SECOND AND THIRD DISTRICT COURTS OF APPEAL ON THE QUESTION OF WHETHER A DEFENDANT'S PRIOR PETIT THEFT CONVICTIONS MUST BE ALLEGED IN THE CHARGING INSTRUMENT IN ORDER FOR THE DEFENDANT TO BE FOUND GUILTY OF AND SENTENCED FOR FELONY PETIT THEFT.

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. (R386) However, Petitioner's jury convicted him not of this serious felony, but of the second degree misdemeanor of petit theft. (R310,390,391) § 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 convic-

tion 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.

At least three cases directly address the issue raised herein, that is, whether a defendant's prior petit theft convictions must be alleged in the charging instrument before he can be found guilty of and sentenced for felony petit theft, and these cases are in conflict. In Crocker, the appellee had been charged by information with resisting an officer without violence and grand theft, but was found guilty by a jury of resisting an officer without violence and petit theft. The Second District Court of Appeal held that the trial court erred in refusing to find Crocker, who allegedly had two prior theft convictions, guilty of felony petit theft and sentence him accordingly, rejecting Crocker's argument that the predicate prior theft convictions must be specifically alleged in the charging document. The court agreed with the rationale of its sister court in Peek v. Wainwright, 393 So. 2d 1175 (Fla. 3d DCA 1981), in which the Third District Court of Appeal held that one (such as the Petitioner in the instant case) who was charged with strong-armed robbery, but found guilty of petit theft, could be sentenced for felony petit theft, even though the charging document

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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.

did not allege any prior petit theft convictions. The Second District Court of Appeal relied upon its holding in Crocker to affirm Petitioner's conviction and sentence in the instant case. (Appendix, p. 1-2) In the more recent case of Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992), however, the Fourth District Court of Appeal came to the opposite conclusion. 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. In reaching this result, the Fourth District relied heavily upon State v. Rodriquez, 575 So. 2d 1262 (Fla. 1991), in which this Court decided 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. In Rodriquez this Court found the felony DUI statute "indistinguishable" from the felony petit larceny statute in the sense of what is required to establish the substantive offense. 575 So. 2d at 1265. The Clay court found the Second District's reasoning in Crocker "persuasive," but opined that it had been superseded by the Rodriquez decision. 595 So. 2d at 1053. See also Jenkins v. State, 617 So. 2d 836 (Fla. 4th DCA 1993) (funda-

mental error for trial court to adjudicate and sentence defendant for first degree misdemeanor theft when State failed to allege the element making that theft a first degree misdemeanor).

Conflict thus clearly exists between the decisions of the Second District Court of Appeal in Crocker and in Petitioner's case, and the decision of the Third District Court of Appeal in Peek on the one hand, and the decision of the Fourth District Court of Appeal in Clay on the other hand. The approach taken by the Second and Third Districts can have serious consequences for defendants, as it did for Petitioner, who ended up with a 10-year prison sentence after being convicted by a jury of his peers of a second degree misdemeanor carrying a maximum sentence of 60 days in jail. This Court must resolve the conflict that exists to assure uniform application of the laws of Florida throughout the State.

CONCLUSION

Conflict exists between, on the one hand, State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1978), Peek v. Wainwright, 393 So. 2d 1175 (Fla. 3d DCA 1981), and Petitioner's cause, in which the appellate courts determined that it is not necessary for the State to put a defendant on notice in the charging instrument that he is subject to prosecution and punishment for felony petit theft, and, on the other hand, Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992), in which the court held that the trial court could not reclassify a petit theft conviction to grand theft where the information did not make reference to prior petit theft convictions and did not charge felony petit theft. This Court must exercise its discretionary jurisdiction to review Petitioner's cause and resolve the conflict in order to maintain uniformity throughout Florida in the way the laws are administered.

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAY ROBINSON YOUNG, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 92-01778

Opinion filed December 10, 1993.

Appeal from the Circuit Court for Highlands County; J. Dale Durrance, Judge.

James Marion Moorman, Public Defender, and Robert F. Moeller, Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, For Appellee.

PER CURIAM.

Affirmed. See State v. Crocker, 519 So. 2d 32 (Fla. 2d

DCA 1987). We recognize that our decision in this case conflicts with Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992).

CAMPBELL, A.C.J., and BLUE, and BROWNELL, SCOTT M., ASSOCIATE JUDGE, Concurs.

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 18th day of January, 1994.

Respectfully submitted,

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