o.a. 6-10-94

IN THE SUPREME COURT OF FLORIDA

JAY ROBINSON YOUNG,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 83,000

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts with the additions that defense counsel requested a jury instruction on the lesser included offense of petit theft (R 270) and that copies of the judgments the State was relying on were attached to Petitioner's copy of the State's notice that it would seek to have Petitioner sentenced for felony petit theft (R 402).

SUMMARY OF THE ARGUMENT

When a criminal defendant charged with robbery is convicted of petit theft as a lesser included offense and subsequently adjudicated guilty of and sentenced for felony petit theft, due process is not violated merely because the information filed against him did not allege his prior petit theft convictions any more than due process is violated when a defendant is classified and sentenced as an habitual felony offender or an habitual violent felony offender without his prior qualifying felony offenses having been alleged in the charging document. This Court should disapprove *Clay v. State*, 595 So. 2d 1052 (Fla. 4th DCA 1992), and approve *State v. Crocker*, 519 So. 2d 32 (Fla. 2d DCA 1987), and the Second District's opinion in the instant case.

ARGUMENT

WHETHER PETITIONER WAS PROPERLY ADJUDICATED GUILTY OF FELONY PETIT THEFT AND SENTENCED ACCORDINGLY WHERE THE INFORMATION UNDER WHICH HE WAS CONVICTED OF PETIT THEFT DID NOT ALLEGE HIS PRIOR PETIT THEFT CONVICTIONS.

Although Petitioner insists that he was denied due process in being adjudicated and sentenced for felony petit theft, he does not explain *how* he was denied due process. As noted in Petitioner's statement of facts, Petitioner was originally charged with robbery, not felony petit theft. He was tried by jury and requested that the jury also be instructed on, inter alia, the lesser included offense of petit theft, of which lesser offense he was ultimately convicted. Following his trial and a month before his first sentencing hearing, he was served with notice that the State sought to have him sentenced for felony petit theft, and copies of the judgments the State was relying on were attached to his copy of the notice (R 402). At no time has Petitioner claimed that he had insufficient time to prepare his response to the State's notice.

Nor is this a case where the defendant was tried on or pled guilty or nolo contendere to the substantive charge of petit theft prior to receiving notice that the State was seeking felony petit theft sentencing. That was the situation in *State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991), wherein the issue was stated as "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*." *Id.* at 1263 (emphasis supplied). Here and in *Clay, Crocker*, and *Peek v. Wainwright*, 393

So. 2d 1175 (Fla. 3d DCA 1981), however, the defendants were charged with robbery (*Clay, Peek*, and the instant case) or grand theft (*Crocker*) and convicted by a jury of petit theft as a lesser included offense. All three courts agreed that, in such circumstances, particularly where, as here and in *Peek*, the accused him- or herself requested the jury instruction on petit theft, it would be inadvisable to require the State to charge felony petit theft in the alternative in every case in which the jury could find the defendant guilty of felony petit theft as a lesser included offense of one of the crimes actually charged. *Peek* noted that "[t]o accept the petitioner's contention would totally frustrate the Legislature in its attempt to enhance the penalty of the chronic offender" inasmuch as the petitioner "does not allege he has been denied due process by not having notice or a proper hearing and proof of his prior convictions." 393 So. 2d at 1177. *Crocker* added: "We find no reason why we should protect an accused from possible prejudice by keeping evidence of his prior convictions from the jury and then hold that he cannot be convicted of the crime because he is so protected." 519 So. 2d at 34.

Another significant distinction between the instant case and *Rodriguez* is that Rodriguez was not given notice at any time prior to sentencing of the specific prior convictions the State was relying on, whereas Petitioner was. Similarly, *Peek* notes that the defendant there did not complain of lack of notice, and *Crocker* specifies that, in determining the historical fact of the defendant's prior convictions and questions regarding identity, "the

court should follow a procedure similar to that employed under the habitual offender statute," 519 So. 2d at 33, which requires advance written notice of intent to habitualize a defendant, § 775.084(3)(b), Fla. Stat. (1993); *Ashley v. State*, 18 Fla. L. Weekly S127 (Fla. February 25, 1993), and presentation of the evidence regarding qualified offenses "in open court with full rights of confrontation, cross-examination, and representation by counsel," § 775.084(3)(c). Clearly, if, as here, a defendant is duly given notice a reasonable period of time before the sentencing hearing of the State's intent to have him sentenced for felony petit theft and, at least upon request, of which specific prior convictions the State intends to rely on, and if, as here, such a defendant then has an opportunity to be heard prior to adjudication and sentence for felony petit theft, that defendant cannot seriously complain that he has been denied due process.

As opposing counsel recognizes, even the *Clay* court found *Crocker*'s reasoning persuasive. The *Clay* court, however, concluded that *Rodriguez* compelled a contrary conclusion. Respondent submits that both the *Clay* court and Petitioner are wrong about that because, as explicated *supra*, there are two major factual differences between all of the District Court cases in issue herein and *Rodriguez*.

Finally, in light of the facts that, except in capital cases, the jury is not advised of the penalty for either the charged offenses or any of the lesser included offenses it is instructed on, Fla. R. Crim. P. 3.390(a), and that, even where a defendant is

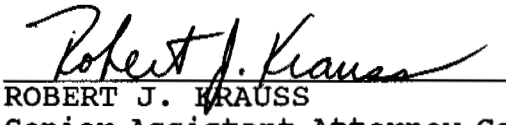
actually charged with felony petit theft, the jury is called upon only to decide the defendant's guilt of the underlying misdemeanor, *State v. Phillips*, 463 So. 2d 1136 (Fla. 1985), Judge Farmer's specially concurring opinion in *Clay* is without merit.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the opinion of the District Court below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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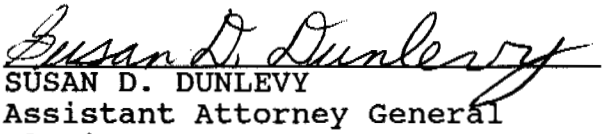

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert F. Moeller, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33830, this 25th day of March, 1994.

Susan D. Dunlevy
OF COUNSEL FOR RESPONDENT