OA 6-10-94

047

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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
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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?

Respondent asserts that "[all three courts" which decided Clay v. State, 595 So. 2d 1052 (Fla. 4th DCA 1992), Peek v. Wainwright, 393 So. 2d 1175 (Fla. 3d DCA 1981), State v. Crocker, 519 So. 2d 32 (Fla. 2d DCA 1987) and the instant case agree that "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." (Respondent's Brief on the Merits, p. 3) This statement is incorrect. Clearly, one of the three courts, the Fourth District Court of Appeal, which decided Clay, does require the State to charge felony petit theft in any case in which the State wishes to proceed against the defendant for this offense. The court specifically so stated in Clay: "Based on [State v.] Rodriguez[, 575 So. 2d 1262 (Fla. 1991)], we conclude that the state must allege the elements of the felony petit larceny statute in its charging document if it intends to proceed under section 812.014(2)(c) [the former petit theft statute, which has since been renumbered, and is now section 812.014(2)(d)]." 595 So. 2d at 1053. [The defendant in Clay was charged with armed robbery

and resisting a merchant, but was convicted of petit theft and resisting a merchant.]

Respondent attempts to distinguish State v. Rodriguez, 575 So. 2d 1262 (Fla. 1991) from the instant case because "Rodriguez was not given notice at any time prior to sentencing of the specific prior convictions the State was relying on, whereas Petitioner was." (Respondent's Brief on the Merits, p. 3) It is not clear to Petitioner from the opinion in Rodriguez whether this statement is accurate or not, but it is clear that Rodriguez was put on notice from the very outset of his prosecution that he was being charged with felony DUI; the information specifically cited the felony DUI statute, and Rodriguez moved at arraignment "to dismiss or to transfer the matter to the county court, asserting that because the information did not inform him of what specific prior offenses he allegedly committed, the information did not adequately charge the felony, and therefore the circuit court had no jurisdiction." 575 So. 2d at 1263. Thus having knowledge that he was being charged with felony DUI, Rodriguez presumably could have availed himself of the discovery procedures provided for in the Florida Rules of Criminal Procedure to ascertain what specific prior offenses he allegedly committed; Petitioner had no such opportunity prior to trial, as he was not put on notice that the State would proceed against him for felony petit theft.

Respondent also attempts to distinguish Rodriguez because there the defendant was specifically charged with the offense of felony DUI, whereas Petitioner here was not charged with felony

petit theft, but was charged with robbery, and was convicted of petit theft as a lesser included offense. Respondent fails to explain how and why this should make any difference; it would seem to be a distinction without a difference. As indicated above, one who is charged with the substantive offense at issue, be it felony DUI or felony petit theft, but who is not apprised of the specific prior offenses upon which the State intends to rely, has more notice of what he is facing than did Petitioner. Thus, if anything, the fact that Petitioner was not charged with the substantive offense of felony petit theft, but nevertheless ended up being convicted of this crime, shows that he suffered a greater deprivation of due process than did Rodriguez.

Respondent relies upon Crocker in arguing that a proceeding against a defendant for felony petit theft should be treated the same as an habitual offender proceeding. (Respondent's Brief on the Merits, pp. 3-4) However, in Rodriquez, this Court specifically rejected such an analogy. The Court discussed its decision in State v. Harris, 356 So. 2d 315 (Fla. 1978) and noted: "Justice Hatchett concluded for the Court that the felony petit larceny statute 'creates a substantive offense and is thus distinguishable from [s]ection 775.084, the habitual criminal offender statute.' Harris, 356 So. 2d at 316." 575 So. 2d at 1265.

Finally, Respondent complains that Petitioner "does not explain how he was denied due process." (Respondent's Brief on the Merits, p. 2) The denial should be obvious, as it was in Rodriquez. The essence of the due process violation is the lack of

notice to Petitioner. This affected his preparation for trial. For example, Respondent emphasizes that it was Petitioner himself who requested that the jury be instructed on the lesser included offense of petit theft, of which he was ultimately convicted, and which enabled the State to proceed against him for felony petit theft. (Respondent's Brief on the Merits, pp. 2-3) Had Petitioner been placed on notice pretrial that the State would proceed against him for felony petit theft, and been informed of the specific prior convictions the State would attempt to prove to establish his guilt of this offense (and, hence, been in a position to assess whether the State could prove its case), Petitioner might have foregone any instruction on the lesser of petit theft and taken his chances on being convicted as charged, or convicted of the other lesser included offense of battery, or found not guilty. An election to proceed in this manner would have been eminently reasonable if Petitioner had known that he might end up with a 10 year prison term upon being convicted by the jury of petit theft.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Petitioner, Jay Robinson Young, renews his prayer for the relief requested in his initial brief on the merits.

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 20th day of April, 1994.

Respectfully submitted,

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