IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. _____
[4th DCA No. 94-0437]

STATE OF FLORIDA,

Petitioner,

vs.

EUGENE C. BAIN,

Respondent.

85,294

****

ON PETITION FOR DISCRETIONARY REVIEW

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PETITIONER'S BRIEF ON JURISDICTION

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MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent was the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Petitioner was the Appellee and Respondent was the Appellant in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Appellant may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto.

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS
(Limited to the issue of jurisdiction)

Respondent was charged and convicted of burglary of a structure, to wit: Dodgertown Elementary School. The evidence at trial established that Respondent entered the curtilage of the school cafeteria, thus the conviction. On appeal before the District Court of Appeal, Fourth District, Respondent contended he did not enter the cafeteria, therefore he could only be convicted of trespass. Finding that, "[t]here was no proof that the defendant entered the school cafeteria nor any curtilage, **the building not having been enclosed in any manner,**" the District Court reversed the judgment and sentence for burglary, and remanded the cause with direction that Respondent be adjudicated and sentenced for trespass. (See A. 1). In support of its conclusion, the appellate court cited to Hamilton v. State, 19 Fla. L. Weekly D2441 (Fla. 2d DCA Nov. 16, 1994), certified questions pending, State v. Hamilton, Case No. 84,783 (Fla. Dec. 5, 1994).

Petitioner sought rehearing from the Fourth District Court arguing that the property does not have to be enclosed in order for it to have a "curtilage". (See A. 3-10). Petitioner, in addition, asked the District Court to certify the same question certified in Hamilton. (See A. 3-10). Rehearing and certification were denied by the District Court's order of February 23, 1995. (See A. 11). Petitioner filed its Notice to Invoke Discretionary Jurisdiction on March 1, 1995, and this brief follows.

SUMMARY OF THE ARGUMENT

The decision in the present case cites as controlling authority Hamilton v. State, 19 Fla. L. Weekly D2441 (Fla. 2d DCA Nov. 16, 1994), which is now pending review before this Court under State v. Hamilton, Case No. 84,783 (Fla. Dec. 5, 1994) (certified question pending).

In the case at bar, the District Court reversed Respondent's conviction for burglary of a structure on the basis that the evidence did not show Respondent "entered the school cafeteria nor any curtilage, the building **not having been enclosed in any manner.** (Appendix). The Hamilton Court certified the following question as one of great public importance:

> DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE "CURTILAGE" BE ENCLOSED AND, IF SO, TO WHAT EXTENT?

The question is pending resolution by this Court, see State v. Hamilton, Case No. 84,783 (Fla. Dec. 5, 1994). Since this Court has jurisdiction of Hamilton, the Court also has jurisdiction to review the opinion in the instant case which presents the identical issue as Hamilton. Article V, Sec. 3(b)(4), Fla. Const.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW WHICH HAS CITED AS CONTROLLING AUTHORITY HAMILTON v. STATE WHICH IS PENDING REVIEW IN THIS COURT.

Article V, Sec. 3(b)(4) of the Florida Constitution empowers this Court to review any decision of a district court of appeal which certifies to this Court a question of great public importance. In its opinion in the instant case, the Fourth District cited as controlling authority Hamilton v. State, 19 Fla. L. Weekly D2441 (Fla. 2d DCA Nov. 16, 1994). (Appendix). Hamilton is pending review in this Court, State v. Hamilton, Case No. 84,783 (Fla. Dec. 5, 1994) to answer the following certified question:

> DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE "CURTILAGE" BE ENCLOSED AND, IF SO, TO WHAT EXTENT?

Article V, Sec. 3(b)(4) of the Florida Constitution gives this Court jurisdiction to review a question of great public importance. Therefore, this Court clearly has jurisdiction in Hamilton. Moreover, since Hamilton is pending in this Court in case No. 84,783, this Court has jurisdiction to review the case at bar. Reed v. State, 20 Fla. L. Weekly S34 (Fla. Jan. 19, 1995); State v. Brown, 475 So. 2d 1 (Fla. 1985); Jollie v. State, 405 So. 2d 418 (Fla. 1981).

A review of the District Court's opinion in the instant case (Appendix) shows that the District Court answered the Hamilton certified question in the affirmative, when it reversed the

conviction on the sole basis that the defendant did not "enter" the school cafeteria "curtilage" because the building was not **enclosed** in any manner. The State submits that sound policy reasons exist for this Court to exercise its discretionary review jurisdiction over this case to correct the adoption of an erroneous rule of law by the District Court in the case at bar. Where it is clear from the face of the opinion that the case involves the identical legal issue certified to be a question of great public importance in another case, this Court's jurisdiction is properly invoked on the petitioner's behalf on the basis of the certified question in the other case. State v. Brown, supra.

By virtue of the Fourth District's citation to Hamilton as the controlling case in the opinion below, since Hamilton is currently pending review before this Court, this Court should accept jurisdiction of the instant case. State v. Brown, supra; Jollie v. State, supra.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited therein, the State respectfully requests this Court to accept jurisdiction in the case at bar.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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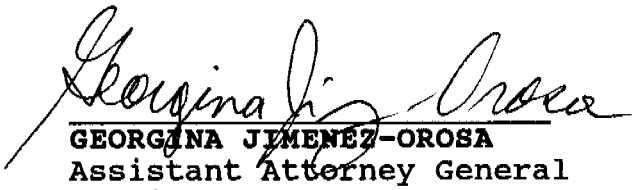

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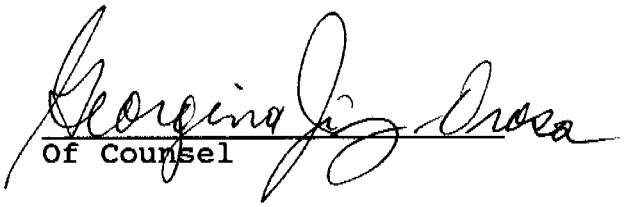
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on Jurisdiction" has been furnished by courier to ELLEN MORRIS, Assistant Public Defender, The Criminal Justice Bldg./6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 7th day of March, 1995.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
[4th DCA No. 94-0437]

STATE OF FLORIDA,

Petitioner,

vs.

EUGENE C. BAIN,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

APPENDIX TO

PETITIONER'S BRIEF ON JURISDICTION

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K

94-1402

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1994

EUGENE C. BAIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 94-0437.

L.T. CASE NO. 93-1157.

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

Opinion filed January 4, 1995

Appeal from the Circuit Court for Indian River County; Joe Wild, Judge.

Richard L. Jorandby, Public Defender, and Ellen Morris, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We reverse the defendant's judgment and sentence for burglary, and remand with direction that he be adjudicated and sentenced for trespass, which is the relief expressly sought in appellant's initial brief. There was no proof that the defendant entered the school cafeteria nor any curtilage, the building not having been enclosed in any manner. Hamilton v. State, 19 Fla. L. Weekly D2441 (Fla. 2d DCA Nov. 16, 1994); State v. Rolle, 577 So.

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2d 997 (Fla. 4th DCA 1991); DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978); Fla. Std. Jury Inst. (Crim.) 135, 135-36.[1]

On remand, we caution the trial court against making the same errors when resentencing the defendant as it made when it originally sentenced him. When assessing prosecution costs, the trial court should consider the amount of the state's expenses and the defendant's ability to pay. § 939.01(5), Fla. Stat. (1993). The defendant must be afforded an opportunity to be heard and offer objections to the amount of public defender fees and costs assessed against him. § 27.56(7), Fla. Stat. (1993). Finally, the trial court may not award appellate costs before the issuance of a mandate. Anderson v. State, 632 So. 2d 132 (Fla. 4th DCA 1994).

HERSEY, GLICKSTEIN and KLEIN, JJ., concur.

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[1] The standard jury instruction for burglary defines structure as "any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure." (Emphasis added).

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94-140237

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

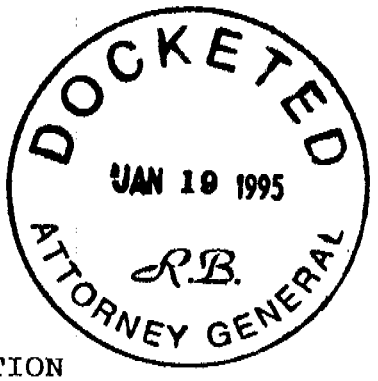
EUGENE C. BAIN,)

Appellant,)

v.) CASE NO. 94-0437

STATE OF FLORIDA,)

Appellee.)



MOTION FOR REHEARING AND/OR CERTIFICATION
AND
MOTION FOR STAY OF MANDATE

COMES NOW Appellee, the State of Florida, by and through undersigned counsel and pursuant to Fla. R. App. P. 9.330(a), respectfully moves this Honorable Court to rehear and clarify its decision issued January 4, 1995, in the captioned cause, and in support thereof would say:

1. Upon the finding that "[t]here was no proof that the defendant entered (emphasis added) the school cafeteria nor any curtilage, (emphasis in original) the building not having been enclosed in any manner," this Court reversed the defendant's judgment and sentence for burglary, and remanded with direction that he be adjudicated and sentenced for trespass, "which is the relief expressly sought in appellant's initial brief." Bain v. State, 20 Fla. L. Weekly D118 (Fla. 4th DCA Jan. 4, 1995).

2. The State respectfully requests this Court to reconsider and clarify its opinion since it overlooked or misapprehended the facts and law as it applies to this particular case in several respects.

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A. This Court reversed and remanded with direction that Appellant be adjudicated and sentenced for trespass, "which is the relief expressly sought in appellant's initial brief." The State would point out that Appellant was charged with Burglary of a Structure (R. 9). Although the evidence showed that Appellant was warned by school officials that he was not allowed to be in the campus of the property of Dodgertown Elementary School, Appellant was not charged, and the State did not present its case with the view of obtaining a conviction for trespass of the school land under Sec. 810.09, Fla. Stat.[1]

Section 924.34, Fla. Stat., provides:

> **924.34 When evidence sustains only conviction of lesser offense.**--When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.
> (Emphasis added.)

Since Appellant was charged with Burglary of a **Structure**, i.e. the school cafeteria, and this Court reversed because "[t]here was no proof that the defendant entered the school cafeteria nor

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[1] Appellant could have been, but was not, charged with two offenses: trespass on the school grounds under Sec. 810.09, Fla. Stat. and burglary of a structure, i.e. the school cafeteria, under Sec. 810.02, Fla. Stat. See Tobler v. State, 371 So. 2d 1043, 1045 (Fla. 1st DCA 1979) (Tobler committed two separate breakings and enterings and, therefore two separate offenses. Tobler's forced entry into the fenced area was one burglary, and his later forced entry into the enclosed trailer parked within the fenced area was a second burglary.)

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any curtilage," Appellant's judgment cannot be reduced to trespass under Sec. 810.08, Fla. Stat. because under the holding of this Court, Appellant did not enter the structure. Appellant's conviction cannot be reduced to trespass under Sec. 810.09, Fla. Stat. because he was not charged with trespass on property other than structure or conveyance. The State submits that under Sec. 924.34, this Court must remand for adjudication and sentence for attempted burglary, since this is the lesser degree offense established by the evidence presented at trial. Appellant broke the window to the cafeteria with the intent to commit a felony therein, but did not enter the structure only because he saw a ten foot drop (T. 78-79). See Foster v. State, 220 So. 2d 406 (Fla. 3d DCA 1969). Therefore, it is clear that if this Court still believes Appellant did not commit a burglary because the curtilage was not enclosed, then it is clear that Appellant did commit attempted burglary of the structure when he broke the window with the necessary intent, then stopped because of the ten foot drop. Id.

B. The State would additionally urge this Court to rehear this case because the Court misapprehended the law of burglary by holding that the curtilage must be fenced-in in order to fall under the language of the statute. Florida cases dealing with burglary reveal that the appellate courts of this State have not required the curtilage to be fenced in or enclosed to be considered part of the dwelling or structure. In J.E.S. v. State, 453 So. 2d 168 (Fla. 1st DCA 1984), it was held that the driveway of a dwelling is within the curtilage of the

dwelling, for purposes of the burglary statute. The J.E.S. opinion cites the search and seizure cases of State v. Musselwhite, 402 So. 2d 1235 (Fla. 2d DCA 1981) and Joyner v. State, 303 So. 2d 60 (Fla. 1st DCA 1974). Both Musselwhite and Joyner agree "that a driveway to one's residence is within the curtilage of that property." J.E.S. at 168. There is no mention of a fence or enclosure in any of these three cases.

In State v. Black, 617 So. 2d 777 (Fla. 3d DCA 1993), the defendant was charged with burglary for entering the curtilage of a house and taking new roofing paper. The Black court noted that the officer's reasonable suspicions were confirmed when he placed the defendant in his patrol car, drove up the street, and "found a house which had several identical rolls of tar paper in the yard, along with a tarring machine." Black, at 778. The opinion does not indicate that the yard was enclosed. Rather the fact that the police officer could see the rolls of paper in the yard from his patrol car indicated a clear view unimpeded by an enclosure.

Although in DeGeorge v. State, 358 So. 2d 217 (Fla. 4th DCA 1978), this Court stated the burglary involved a "paved area, partially enclosed by a fence, a brick wall and the structure itself," this Court discussed the expansion of the definition of curtilage. In doing so, the court cited to Joyner, in which the First District Court of Appeal opined that the curtilage of a dwelling house "need not be separated from other lands by a fence, nor does the intersection of a divisional fence necessarily affect the relation of a building thus separated by it." 358 So. 2d at 219 (citing Joyner).

Thus in the case at bar, where the structure and its curtilage was in the midst of buildings comprising the school grounds, with a fence on the northern end of the grounds, it is clear that Appellant committed burglary of the school cafeteria when he entered the school cafeteria curtilage.

3. Should this Court decline to entertain rehearing of the January 4, 1995 opinion issued in this case, the State respectfully request this Court join the Second District Court of Appeal and certify the same question of great public importance certified in Hamilton v. State, 19 Fla. L. Weekly D2441 (Fla. 2d DCA Nov. 16, 1994); one of the cases relied upon by this Court in support of its reversal in the instant case. The State respectfully requests that this Court certify the following question to the Florida Supreme Court:

> DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE "CURTILAGE" BE ENCLOSED AND, IF SO, TO WHAT EXTENT?

Certification should be granted because this is not an isolated case, as can be seen by the Hamilton opinion, which is presently pending before the Florida Supreme Court, see State v. Hamilton, Case No. 84,783 (Fla. Dec. 5, 1994) (certified question pending), and it is definitely a question of great public importance to the Bench and Bar.

4. Lastly, the State respectfully requests that consistent with the procedure outlined by the Florida Supreme Court in Jollie v. State, 405 So.2d 418, 420-421 (Fla. 1981), this Court stay issuance of mandate pending resolution of the certified question by the Florida Supreme Court in Hamilton, and the instant case should the question be certified herein.

The four factors to be considered when reviewing a motion to stay a mandate are:

(1) the likelihood that jurisdiction will be accepted by the Florida Supreme Court;

(2) the likelihood of ultimate success on the merits;

(3) the likelihood of harm if no stay is granted;

(4) the remediable quality of any such harm.

See Sullivan v. State, 372 So. 2d 938 (Fla. 1979); Fla. R. App. P. 9.120, Committee Notes, 1977 Revision.

Regarding these four factors, the State asserts:

(1) The issue is one of great public importance; the Second District Court of Appeal certified the question on the issue as one of great public importance, and that case is presently pending before the Florida Supreme Court. Therefore, it is very likely that the Supreme Court will accept jurisdiction to answer the question, specially if the same question is certified by two different appellate courts.

(2) In light of the Florida Supreme Court's opinion in Baker v. State, 636 So. 2d 1342 (Fla. 1994), the State submits that likelihood of success on the merits is high.

(3) Under the conviction for burglary, on February 3, 1994, Appellant was sentenced to ten years imprisonment as an habitual offender, with credit for 86 days time served. Under the opinion of this Court, the third degree felony conviction is to be reduced to a misdemeanor trespass, and Appellant will in all likelihood be released immediately because he would have served any sentence to be imposed on the conviction as reduced.

Should the State prevail in the Supreme Court, and this Court's opinion quashed, the State would undoubtedly be harmed because it is highly unlikely that the State would ever be able to find Appellant and bring him back to serve the remaining portion of his ten years sentence as an habitual felony offender.

(4) As can be seen, the remediable quality of such harm is nonexistent.

WHEREFORE based on the above and foregoing the State respectfully requests this Honorable Court **GRANT** the instant Motion for Rehearing to reconsider its ruling on the above stated ground. In the alternative the State respectfully requests this Honorable Court certify the proposed question as being one of great public importance; and **STAY** issuance of the mandate in the instant case pending the resolution of the issue by the Florida Supreme Court.

Respectfully submitted,

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Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Motion for Rehearing" has been furnished by courier to: ELLEN MORRIS, Assistant Public Defender, Counsel for Appellant, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, FL 33401 this 19th day of January, 1995.

Georgina Jiménez-Orraca
Of Counsel

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94-1416237

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402

EUGENE C. BAIN

Appellant(s),

vs.

STATE OF FLORIDA

Appellee(s).

CASE NO. 94-00437

L.T. CASE NO. 93-1157
INDIAN RIVER

February 23, 1995

ORDERED that appellee's motion filed January 19, 1995, for rehearing and/or certification and motion for stay of mandate is hereby denied.

I hereby certify the foregoing is a
true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Attorney General-W. Palm Beach
Public Defender 15

/CH

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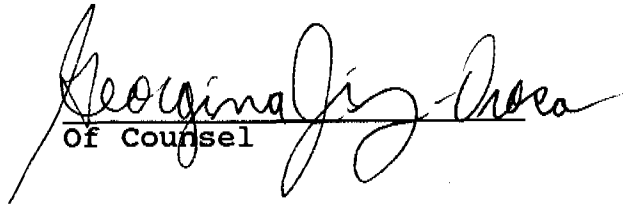
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Appendix to Petitioner's Brief on Jurisdiction" has been forwarded by courier to ELLEN MORRIS, Assistant Public Defender, The Criminal Justice Bldg./6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 7th day of March, 1995.



Of Counsel