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IN THE SUPREME COURT OF FLORIDA

HOUSTON D. PERKINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,248

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, HOUSTON D. PERKINS, defendant/appellant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, plaintiff/appellee below, will be referred to herein as "the State."

References to the opinion of the First District Court of Appeal, found in the appendix of this brief, will be noted by its Southern 2d citation.

STATEMENT OF THE CASE AND FACTS

The State accepts the Petitioner's statement of the case as being essentially accurate. The State also accepts the Petitioner's facts as being essentially accurate although containing an abundance of facts which are irrelevant to the issue being litigated.

SUMMARY OF ARGUMENT

The certified question must be answered in the affirmative because the language of the burglary statute is clear and unambiguous and therefore must be given full effect.

ARGUMENT

CERTIFIED QUESTION PRESENTED

> DO THE 1982 AMENDMENTS TO CHAPTER 810, FLORIDA STATUTES, SUPERSEDE THE COMMON-LAW DEFINITION OF A DWELLING, WHEREBY A STRUCTURE'S DESIGN OR SUITABILITY FOR HABITATION, RATHER THAN ACTUAL OCCUPANCY OR INTENT TO OCCUPY, IS CONTROLLING IN DETERMINING WHETHER A STRUCTURE CONSTITUTES A DWELLING?

The certified question can only be answered yes. Under common law, a house was not considered a "dwelling" for purposes of the burglary statute unless it was actually occupied. Tukes v. State, 346 So. 2d 1056 (Fla. 1st DCA 1977); Smith v. State, 80 Fla. 315, 85 So. 911 (Fla. 1920). However, as recognized by both petitioner and the First District Court of Appeal, the burglary statute was amended in 1982 to include the following specific definition of the term "dwelling":

> "Dwelling" means a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.

Ch. 82-27, s. 1, Laws of Fla. (emphasis added); Section 810.011(2), Florida Statutes. As this court recognized in State v. Hamilton, 660 So. 2d 1038, 1045 (Fla. 1995), the legislature clearly has the authority to amend the burglary statute and to redefine the terms used therein. In enacting the 1982 amendments, the legislature did

so; and because the definition of "dwelling" included in the present statute is clear and unambiguous, the First District correctly concluded that actual occupancy is irrelevant and that an unoccupied home is a "dwelling" for purposes of the current burglary statute.

Petitioner argues - and Judge Ervin, in his dissenting opinion below, agreed - that the legislature did not actually intend to override the common law definition of "dwelling." However, as the majority below correctly concluded,

> the plain meaning of the statute precludes consideration of those factors cited in support of [this] position. The supreme court in *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 694-695 (1918), held:
>
> > The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. . . . Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction. . . .

Perkins v. State, 630 So. 2d 1180, 1182 (Fla. 1st DCA 1994). Furthermore,

> [e]ven where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself

> authorized to depart from the plain meaning of the language which is free from ambiguity.

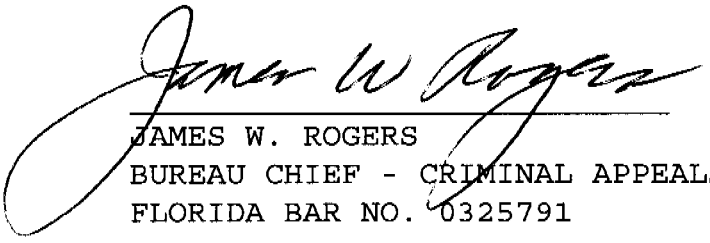
Van Pelt v. Hilliard, 78 So. 693, 694-695 (Fla. 1918). See also, State v. Egan, 287 So. 2d 1 (Fla. 1973). Thus, because the definition of dwelling provided in the current burglary statute is unambiguous, this court cannot redefine the terms used. Therefore, petitioner's argument that the legislature did not intend to change the common law definition of "dwelling" is without merit. The legislature did in fact change the definition and this Court must give full effect to the plain meaning of the statute. See, Sheffield v. Davis, 562 So. 2d 384, 386 (Fla. 2d DCA 1990)("When the language of a statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning."). See also, Graham v. State, 472 So. 2d 464 (Fla. 1985). Thus, the certified question must be answered in the affirmative.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Honorable Court affirm the decision of the First District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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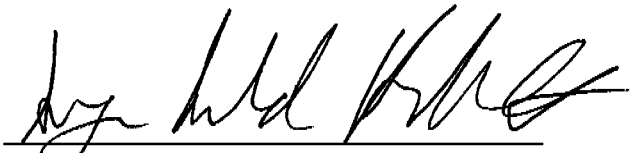
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by U.S. Mail to Kathryn L. Sands, 353 East Forsyth Street, Jacksonville, Florida 32202, this 2 day of February, 1996.



Sonya Roebuck Horbelt
Assistant Attorney General

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IN THE SUPREME COURT OF FLORIDA

HOUSTON D. PERKINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 86,248

APPENDIX

First District's opinion, filed January 12, 1994

92-110903-TZR
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

HOUSTON D. PERKINS,	)	NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND
Appellant,	)	DISPOSITION THEREOF IF FILED.
v.	)	CASE NO. 92-1793
STATE OF FLORIDA,	)	
Appellee.	)	

Opinion filed January 12, 1994.

An Appeal from the Circuit Court for Duval County.
John D. Southwood, Judge.
92-1360-CF

Kathryn L. Sands, Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General, Sonya Roebuck Horbelt, Assistant Attorney General, Amelia L. Beisner, Assistant Attorney General, Department of Legal Affairs, Tallahassee, for Appellee.

LAWRENCE, J.

Houston D. Perkins was convicted of the offense of burglary of a dwelling,[1] proscribed by statute as a second-degree felony. He contends that the structure involved in the burglary did not constitute a dwelling and that he should have been

[1]Section 810.011(2), Florida Statutes (1991), defines dwelling as follows: "a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof".

adjudicated and sentenced only for the offense of burglary of a structure, a third-degree felony.

The evidence at trial established that the burglarized structure was built in 1953 by the current owner. He occupied the house as his residence, but had moved out of the house prior to the burglary. The owner had rented it on occasion and hoped to rent or sell the house in the future "for someone to live in", but he had no intent to return to the house for the purpose of occupying it. On the day of the burglary, the house contained various items of personalty, such as: stove, refrigerator, washer, microwave, dining room chairs, and miscellaneous items in the closets and cabinets. The electricity was on, but the telephone had been disconnected. The water was turned off, although well-water was available on the property. The owner last visited the house three or four weeks before the burglary when he mowed the grass and picked up trash.

One could not be convicted of burglary of a dwelling at common-law if a house was unoccupied and merely capable of or suitable for occupation. Smith v. State, 80 Fla. 315, 85 So. 911 (1920). The legislature amended the burglary statute in 1982, expanding the common-law definition of a dwelling by defining it as any "building or conveyance ... designed to be occupied by people lodging therein at night," Ch. 82-87, § 1, Laws of Fla. (emphasis added). Occupancy is no longer a critical element under this definition. Rather, it is the design of the structure or conveyance which becomes paramount. If a

structure or conveyance initially qualifies under this definition, and its character is not substantially changed or modified to the extent that it becomes unsuitable for lodging by people, it remains a dwelling irrespective of actual occupancy. It is therefore, immaterial whether the owner of an unoccupied dwelling has any intent to return to it. However, we recognize that even under this rationale, credible evidence of the use or intent to use for a purpose other than a dwelling may be sufficient to disqualify a structure as a dwelling.

Our sister court, in State v. Bennett, 565 So. 2d 803 (Fla. 2d DCA 1990) likewise interpreted the amended statute under consideration, and held that a mobile home, unoccupied, unconnected to utilities, and one of several models offered for sale on a sales lot, constituted a dwelling. We adopt their rationale, which discussed legislative staff comments but discounted their importance in view of the plain meaning of the word "designed" contained in the statute.

Another sister court, in L.C. v. State, 579 So. 2d 783 (Fla. 3d DCA 1991), held that a house, unoccupied because the sole inhabitant had died, constituted a dwelling even under the common-law definition. By way of dicta however, that court reasoned that the legislature did not intend by its amendment to abrogate the common-law definition.

Judge Ervin, in his well reasoned dissent, places great emphasis upon the history of this statute and the legislative intent giving rise to the 1982 amendment. Our view, however, is

that the plain meaning of the statute precludes consideration of those factors cited in support of his position. The supreme court in Van Pelt v. Hilliard, 75 Fla. 792, 798-99, 78 So. 693,694-95 (1918), held:

> The Legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms. . . . Whether the law be expressed in general or limited terms, the Legislature should be held to mean what they have plainly expressed, and consequently no room is left for construction.

This holding was followed in State v. Egan, 287 So. 2d 1, (Fla. 1973), in construing a criminal statute relating to a common-law offense.

We certify the following question to the Florida Supreme Court as one of great public importance because of the dicta in L.C. v. State, supra, and the questions raised by Judge Ervin in his dissenting opinion:

> DO THE 1982 AMENDMENTS TO CHAPTER 810, FLORIDA STATUTES, SUPERSEDE THE COMMON-LAW DEFINITION OF A DWELLING, WHEREBY A STRUCTURE'S DESIGN OR SUITABILITY FOR HABITATION, RATHER THAN ACTUAL OCCUPANCY OR INTENT TO OCCUPY, IS CONTROLLING IN DETERMINING WHETHER A STRUCTURE CONSTITUTES A DWELLING.

AFFIRMED.

SHIVERS, SENIOR JUDGE, CONCURS; ERVIN, J., DISSENTS WITH WRITTEN OPINION.

ERVIN, J., dissenting.

I cannot agree with the majority's decision or the Second District's opinion in State v. Bennett, 565 So. 2d 803 (Fla. 2d DCA 1990), which regards the 1982 amendment to Section 810.011(2), Florida Statutes, as superseding the common-law rule precluding a defendant's conviction for burglary of a dwelling once the owner has vacated the house with no intention to return, because, under such circumstances, the place entered had lost its character as a dwelling house. See 3 Charles E. Torcia, Wharton's Criminal Law § 335, at 205-09 (14th ed. 1980). At the trial below, the owner of the house testified that he had owned it since 1953; that he had lived in it, but it had been unoccupied for over six months before the burglary; that the water had been turned off and the telephone disconnected; and that he had no intention to return and live within it, although he planned to sell or rent it for someone else to reside in.

In that we are required to construe penal statutes or statutes in derogation of common law strictly,[2] I am of the view that the interpretation the Third District placed upon the amended statute in L.C. v. State, 579 So. 2d 783 (Fla. 3d DCA 1991), is more consistent with the legislative intent than that of the Second District in Bennett. In L.C., the court agreed with appellant that the legislature's creation of section 810.011(2) did not reflect

[2]See Ex parte Bailey, 39 Fla. 734, 23 So. 552 (1897); Carlile v. Game & Fresh Water Fish Comm'n, 354 So. 2d 362 (Fla. 1977).

any attempt to overrule the common-law definition of a dwelling insofar as it pertained to a prosecution for burglary. The court nevertheless affirmed the appellants' delinquency adjudications for burglary of a dwelling because it considered that the house burglarized complied with the common-law definition. Such evidence, as previously stated, is lacking in the present case.

The court in Bennett admitted that the legislative staff analysis for the 1982 amendment suggested that the legislature intended only to expand the definition of dwelling house to include unoccupied recreational vehicles or travel trailers, by making burglary of them second-degree rather than third-degree felonies. The Second District nevertheless construed the definition to extend the offense of burglary of a dwelling to any burglarized structure or conveyance, whether occupied or not, so long as the evidence disclosed that the structure or conveyance was designed for human habitation and not merely use. I cannot agree with this construction.

It appears to me that the legislature amended the burglary statutes in 1982 only for the purpose of remedying certain defects in the existing burglary statutes, as pointed out by Professor Latimer in his law review article. See Jerome C. Latimer, Burglary Is For Buildings, or Is It? Protected Structures and Conveyances Under Florida's Present Burglary Statute, 9 Stetson L. Rev. 347 (1980). In discussing the statutory definition of conveyance, defined both then and now as "any motor vehicle, ship, vessel,

railroad car, trailer, aircraft, or sleeping car,"[3] Professor Latimer commented that "it appears that a mobile home, for example, not permanently or substantially affixed to the ground, would be a 'conveyance' and not a 'structure.'" Id., at 361. Because the law before the 1982 amendment classified only burglary of a structure used as a dwelling a felony of the second degree, and not burglary of a conveyance used as a dwelling, the burglary, for example, of a mobile home or recreational vehicle used for human habitation could not be enhanced to a second-degree felony because it was not a structure. Additionally, one who burglarized a mobile home and in the process thereof armed himself or herself or assaulted someone therein could not be convicted of a felony of the first degree because a mobile home, notwithstanding its design for occupation by people lodging therein at night, was not a structure. Id.

To remedy the above omissions, the legislature in chapter 82-87 not only added the definition of dwelling to section 810.011, but also amended section 810.02, the statute proscribing burglary as an offense, by including in subsection (2)(b) the words "or conveyance," thereby obviating Professor Latimer's criticism that one who arms himself inside a conveyance could not be convicted of a first-degree felony. Additionally, the legislature amended section 810.02(3) by adding the words "or conveyance," making the

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[3] § 810.011(2), Fla. Stat.

burglary of both conveyances and structures used as dwellings a felony of the second degree.

In my judgment, the legislature's intent in enacting the definition of dwelling is clarified by the following comment in the legislative staff analysis: "The practical effect of this bill is that the burglary of an unoccupied recreational vehicle or travel trailer is a second degree felony rather than a third degree felony." Staff of Fla. S. Comm. on Judiciary-Crim., SB 42 (1981) Staff Analysis and Economic Impact Statement (Oct. 6, 1981) (Fla. State Archives). Therefore, considering the history of the legislation, I think a reasonable construction of the statute is that in employing the term "designed to be occupied by people lodging therein at night" and by including both buildings and conveyances in the definition of dwelling, the legislature intended to extend the same protection to owners of conveyances which were used as dwellings as had formerly been extended to owners of structures used as dwellings, but that it did not intend to abrogate the common-law rule precluding conviction for burglary of a dwelling if the place entered was unoccupied and its owner had no intention to return.[4] Although the contrary construction the

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[4]Numerous cases have considered the common-law rule, see Smith v. State, 80 Fla. 315, 85 so. 911 (1920); Henderson v. State, 80 Fla. 491, 86 So. 4398 (Fla. 1920); Tukes v. State, 346 So. 2d 1056 (Fla. 1st DCA 1977), yet nothing in the legislative staff analysis and economic impact statement even mentions the common-law rule. They only discuss the incidence of burglaries of recreational vehicles and/or motor homes. Absent some reference to the long-standing common-law rule, I see no intent to abrogate it.

Second District placed upon the statute in Bennett is not unreasonable, I am of the view that the interpretation the Third District made in L.S. is more consistent with the statutory maxim requiring that penal statutes be given a strict interpretation.

I would therefore reverse appellant's conviction for second-degree burglary and remand the case with directions that a sentence be imposed upon defendant for the commission of a felony in the third degree.