IN THE SUPREME COURT OF FLORIDA

HOUSTON D. PERKINS,	:	
Appellant,	:	
v.	:	CASE NO. 86,248
STATE OF FLORIDA,	:	District Court of Appeal 1st District - No. 92-1793
Appellee.	:	
_____	:	

ON DISCRETIONARY REVIEW OF QUESTION
CERTIFIED BY THE FIRST DISTRICT COURT

INITIAL BRIEF ON THE MERITS

KATHRYN L. SANDS, P.A.

Kathryn L. Sands
Florida Bar #296791
353 East Forsyth Street
Jacksonville, Florida 32202
(904) 358-2337

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

HOUSTON D. PERKINS,

Appellant,

v. CASE NO. 86,248

STATE OF FLORIDA, District Court of Appeal
1st District - No. 92-1793

Appellee.
_____/

INITIAL BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Appellant, HOUSTON D. PERKINS, was the defendant in the circuit court and the appellant in the First District Court and in this case and he will be referred to in this brief as Appellant. The State of Florida prosecuted the case in the circuit court, was the appellee in the First District Court, and will be referred to as Appellee or the State. The record on appeal will be referred to by use of the symbol "R," followed by the appropriate page number. The transcript of the trial and the motion and sentencing hearings on May 5 and 19, 1992, will be referred to by use of the symbol "T", followed by the appropriate page number. All trial proceedings below were in the Fourth Judicial Circuit Court, in and for Duval County, Florida, before the Honorable John Southwood, Circuit Judge. The initial appeal was before the First District Court of Appeal.

II. STATEMENT OF THE CASE

Appellant was arrested on January 31, 1992, for burglary (R 1, 2). On February 7, 1992, Appellee charged Appellant by Information for burglary of a dwelling pursuant to the provisions of Section 810.02, Florida Statutes (R 6).

Appellant was tried by a jury on May 5, 1992 (T 94-150), and was found guilty of burglary to a dwelling (R 25, T 151). On May 19, 1992, Judge Southwood adjudicated Appellant guilty of burglary to a dwelling, a second degree felony (R 34, T 175).

Following a hearing, the judge committed Appellant to the Department of Corrections for a term of twelve (12) years with one hundred ten (110) days credit, imposed costs of $220.00, and adjudged Appellant to be a habitual felony offender (R 36, T 176). The Sentencing Guidelines Score Sheet indicated a recommended sentence range of two and one-half to three and one-half (2 1/2 to 3 1/2) years and a permitted range of twelve to fourteen and one-half (12 to 14 1/2) years (R 38).

The issue on appeal to the First District Court was whether the trial court erred in not granting Appellant's Motion for Judgment of Acquittal on the charge of burglary of a dwelling under the circumstances of this case.

The First District Court affirmed Appellant's conviction but certified the following question to the Florida Supreme Court as one of great public importance because of the dicta in L.C. v. State, 579 So.2d 783 (Fla. 3d DCA 1991) and the questions raised by Judge Ervin in his dissenting opinion in Appellant's case:

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?

III. STATEMENT OF THE FACTS

In the Arrest and Booking Report (R 2), Officer Robert Phelps wrote that at 8:33 a.m. on January 31, 1992, he investigated a burglary in progress at 2363 Commonwealth Avenue in Jacksonville, Florida. Upon entering the house which was vacant at the time, he observed Appellant hiding in a bedroom closet. Appellant was advised of his rights and arrested.

When Appellant's trial commenced on May 5, 1992, Officer Steven Jerome Spates with the Jacksonville Sheriff's Office testified that on January 31, 1992, at approximately 8:30 a.m., he was the first officer to respond to an anonymous report of a burglary in progress on Commonwealth Avenue in the north side of Jacksonville, Duval County, Florida (T 20, 22). He stated he left his marked car away from the structure and walked to the rear door where he observed three black males in the kitchen area (T 21, 22).

Appellee offered into evidence a photograph allegedly depicting the kitchen area and a bag (T 23, 24). The trial judge initially sustained defense counsel's objection when Officer Spates could not specifically identify the bag in the picture as the bag at the scene because he did not take the photographs himself (T 24, 25).

Officer Spates further testified that he seized a bag into which the suspects appeared to be loading something, that the seized bag was similar to the bag in the photograph and that no other bags were present (T 25). Appellee offered the photograph into evidence again (T 26). The trial judge admitted the

photograph after overruling defense counsel's renewed objection (T 26).

Officer Spates waited outside the house for two minutes until Officer Lott arrived (T 27). Together they entered the "partially cracked open" door of the structure and struggled to restrain and handcuff suspect Miller (T 27). That suspect was taken outside while additional officers arrived and a search was made inside the house for the other two suspects who had fled the kitchen area (T 27, 28).

After Officer Lott located Appellant in a closet, Officer Spates assisted in restraining and handcuffing him (T 29). A third subject was found outside the home (T 29).

Appellee offered other photographs of various parts of the house which were received, without objection by defense counsel (T 29-31).

On cross-examination, Officer Spates testified that all three individuals' backs were turned toward the door through which he was initially peering (T 34). The structure appeared to be abandoned and no one lived there (T 37). There was no electrical lighting or flashlight illumination (T 38) and Officer Spates could not identify Appellant by face as having specifically placed items in the bag (T 39, 40).

Officer Reginold Lott testified that on January 31, 1992, at approximately 8:30 a.m., he was dispatched as a back-up unit investigating an alleged burglary in progress (T 43). He and Officer Spates entered the structure and apprehended suspect Miller

(T 43, 44). Officer Lott then located Appellant in a closet (T46).

Mr. Kenneth R. Brown testified that he owned the structure at 2363 Commonwealth which had been vacant for six months before the incident (T 52, 53, 58). Mr. Brown hoped to sell or rent the structure which had some appliances and electricity but the water and telephone were disconnected (T 53, 58). He had last visited the house three to four weeks before the incident (T 54). Since that time, some appliances and furniture, including the dining room chairs and a cedar wardrobe, as well as personal effects stored in the attic, had been removed but Mr. Brown did not know when those items were taken (T 55, 59). He admitted the garage was broken into a year earlier (T 60). Mr. Brown denied allowing Appellant into the structure (T 57).

Officer C. Robert Phelps proffered testimony regarding statements made by Appellant at the scene (T 63-67). The trial court found that the statements were freely and voluntarily given by Appellant (T 67).

In the presence of the jury Officer Phelps testified that he assisted Officer Lott in apprehending Appellant in the vacant structure and placing him in the back of Officer Lott's car (T 68-70, 73). The officers used their flashlights for illumination and Officer Phelps was not sure if the structure had electricity (T 74).

Officer Lott stated that he patted down Appellant, read him his Miranda rights and asked him about the third suspect (T 70-71). Appellant identified the third suspect by name and described

meeting both of the other suspects earlier that day at a store where they told Appellant they had been taking items from the vacant site on other occasions (T 72). The two men invited Appellant to come with them but Appellant never stated he intended to steal anything, nor did he have any objects on his person (T 72, 75).

Officer Phelps also found a small crowbar outside a door to the house (T 69) but the tool was not introduced as evidence (T 76). There was no testimony regarding any fingerprints on the tool (T 76).

After Appellee rested its case (T 78), defense counsel moved for judgment of acquittal in general and specifically on the issue of burglary to a dwelling (T 79, 80). The trial court heard arguments on the definition of dwelling (T 79-92) and denied the motion for judgment of acquittal (T 92).

Defense counsel rested without presenting evidence or witnesses and renewed the motion for judgment of acquittal which was denied again (T 93).

At the charge conference, the trial judge stated that the verdict forms would include "not guilty, guilty of burglary to a dwelling, guilty of burglary to a structure, and guilty of trespass in a structure" (R 95). Defense counsel requested the form for attempted burglary but the trial court denied the request (T 95, 96).

Defense counsel objected to the proposed jury instruction for stealthful entry because the testimony indicated entry through a

door during the daytime (T 99). The other two suspects had admitted they were in the structure on previous occasions and the owner had noted that furniture and appliances had been removed earlier (T 72, 55, 59). The judge acknowledged there was no evidence of when the pry tool (crowbar) was placed at the scene but stated he would give the instruction anyway (T 99).

Appellee requested, and defense counsel objected to, the instruction on principals (T 101). The trial court decided to give that instruction (T 101).

After the conclusion of closing arguments the judge instructed the jury including the following definition:

> [D]welling 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.

(T 136).

The judge also defined the term structure for the jury:

> [S]tructure means 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.

(T 135).

The jury deliberated for approximately thirty-two (32) minutes before requesting that the definitions of dwelling and structure be repeated (T 147, 148). The judge instructed the jury again (T

149) and the jury deliberated further for six (6) minutes (T 150).

The jury found Appellant guilty of burglary to a dwelling (T 151).

Defense counsel filed a Motion for New Trial alleging the following grounds:

1. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of the State's case.
2. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.
3. The verdict is contrary to the weight of the evidence.
4. The verdict is contrary to the law.
5. The Court erred in giving the state's requested instruction regarding the definition of dwelling, and in deviating from the standard jury instruction and case law.
6. The Court erred in refusing to give an instruction for attempted burglary.
7. The Court erred in giving the stealthful entry instruction as part of the burglary instruction as there was no evidence of stealthful.
8. The Court erred in giving the instruction as to principals in that there was no evidence that the other people involved acted as principals.

(R 22, 23).

At the sentencing hearing on May 19, 1992, the trial court denied the Motion for New Trial (T 158).

The parties agreed that the State's intent to classify Appellant as an habitual offender was based on certified copies of judgments and sentences for Appellant's two convictions of sale or delivery of cocaine in August 1989 and in March 1990 (T 160).

Appellant and several of his relatives testified regarding Appellant's drug problem and his family's strong support (T 162-170).

The judge adjudicated Appellant guilty of burglary to a dwelling (T 175) and determined that he met the criteria for classification as habitual offender (T 176). The court sentenced Appellant to custody of the Florida Department of Corrections for a term of twelve (12) years with one hundred ten (110) days credit, plus costs of $220 (T 176).

The sole argument before the First District Court in this case addressed the issue of whether the structure in which Appellant was arrested was a dwelling for purposes of the burglary statute.

IV. SUMMARY OF ARGUMENT

The 1982 amendments to Chapter 810, Florida Statutes do not reflect a legislative attempt to overrule the common law definition of a dwelling as it pertains to a prosecution for burglary. In this case where the evidence established the structure was vacant for six months with no water or telephone and the owner intended to sell or rent the structure but not to reestablish his residence there, the structure would not have complied with the common law definition of dwelling. Therefore Appellant's conviction for second degree burglary should be reversed and his sentence should be reduced to that of a third degree felony.

V. ARGUMENT

THE 1982 AMENDMENTS TO CHAPTER 810, FLORIDA STATUTES, DO NOT SUPERCEDE OR OVERRULE THE COMMON LAW DEFINITION OF DWELLING AS IT PERTAINS TO BURGLARY.

In his 1980 law review article on burglary, Professor Jerome C. Latimer provides a history of the offense of burglary which under common law was limited to a dwelling house defined as any building where a man and his family reside. 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, 348 (1980).

Burglary to a dwelling has been considered a serious crime because the dweller's "castle" is being invaded rather than serving as a safe and secure or protective surrounding, especially during the night. See 3 Charles E. Torcia, Wharton's Criminal Law Section 335, at 205-209, 206 (14th ed. 1980). In fact case law is replete with factual accounts of burglaries of dwellings where the occupants were assaulted, battered, raped, or killed, or suffered heart attacks from fear during such an intrusion of their "castle". See Nelson v. State, 567 So.2d 548 (Fla. 5th DCA 1990) (vulnerability of 73 year old victim forced to live alone after burglary of her dwelling in which she and her husband were battered and he was institutionalized as a result of his injuries); Sguros v. Biscayne Recreation Development Co., 528 So.2d 376 (Fla. 3d DCA

1987) (boat dweller suffered fatal heart attack when burglar intruded at 3 a.m. "Clearly, when burglars enter a person's home, the people in the home are in some physical danger, as it is well known that burglars often physically abuse their victims." Sguros, at 380); McMillan v. State, 516 So.2d 1064 (Fla. 4th DCA 1987), review denied, 525 So.2d 879 (Fla. 1987) (defendant twice previously convicted of burglary of dwelling involving attempted sexual battery); Brown v. State, 458 So.2d 1216 (Fla. 1st DCA 1984) (consecutive 160-year terms for convictions of sexual battery with great force and burglary of a dwelling with assault).

Many jurisdictions have ruled that a dwelling ceases to be a dwelling when the dweller leaves the structure without the intent to return and it only becomes a dwelling again when a new dweller begins to sleep there regularly. Smith v. State, 80 Fla. 315, 85 So. 911 (Fla. 1920) (structure was not a dwelling where it was vacant for nine months and there was no proof that the mentally ill wife had an intent to return); Tukes v. State, 346 So.2d 1056 (Fla. 1st DCA 1977) (former residence unoccupied for one month and up for sale was no longer a dwelling); Johnson v. State, 188 So.2d 61 (Fla. 3d DCA 1966) (structure recently lived in but unoccupied and for sale after the husband died and the wife was confined to a mental hospital was not a dwelling); State v. Scarberry, 187 W.Va. 251, 418 SE2d 361 (1992) (burglary of mobile home was not burglary of a dwelling where the occupants had moved out a year prior to the burglary with no intent to return and with the intent that it would be repossessed by the lender); see Wharton at 207; see Annotation

85 A.L.R. 428; see 12 C.J.S. Burglary Section 17; see 13 Am.Jur.2d Burglary Sections 3 and 4. This Court and others have distinguished a temporary absence with an intent to return such as spending a season (winter or summer) in another geographic region and still retaining the dwelling character of the structure. Smith, supra; Wharton at 206,207.

In the instant case the owner of the structure had moved out with no intention of returning to live in the house but with a hope of selling or renting it. (T. 52, 53, 58, 59). The telephone and the water had been turned off. (T. 58). The owner had rented the structure on occasion but it had been unoccupied for six months. (T. 58). His last visit to the house was to cut the grass three or four weeks prior to the burglary and several appliances and items of furniture were missing since his last visit. (T 54).

In the majority opinion below, the District Court noted the legislative amendment to the burglary statute in 1982 which extended the definition of dwelling to include "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); Perkins v. State, 630 So.2d 1180 (Fla. 1st DCA 1994). Concluding that design of the unoccupied structure is the critical factor, rather than occupancy, the majority stated that the owner's intent to return is immaterial. Perkins, at 1182.

The majority agreed with the opinion in State v. Bennett, 565

So.2d 803 (Fla. 2d DCA 1990) which held that a one of several unoccupied mobile homes with no utility service located on a sales lot constituted a dwelling under "the plain meaning of the word 'designed' contained in the statute". Perkins, at 1182.

Appellee relied at trial on another case cited by the majority, L.C. v. State, 579 So.2d 783 (Fla. 3d DCA 1991), in which the burglarized structure recently inherited by the deceased inhabitant's daughter and still equipped with utilities and completely furnished including the family pictures on the walls was held to be a dwelling under common law. However in dicta the Third District Court agreed that "in amending section 810.011(2), the legislature did not intend to overrule the common-law definition of a dwelling for purposes of the burglary statute." L.C. at 783.

In his dissent in the instant case, Judge Ervin stated:

> "In that we are required to construe penal statutes or statutes in derogation of common law strictly [footnote deleted], 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 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. [Citation omitted.] 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,' [Footnote citation to section 810.011(2), Fla. Stat.] 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 810.11, 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 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 in 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. [Footnote 4 inserted at end of this quotation.] Although the contrary construction the 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 the defendant for the commission of a felony in the third degree.

"Footnote 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."

Perkins at 1183, 1184.

Appellant adopts Judge Ervin's well reasoned dissent in support of his position that the 1982 amendments to Chapter 810, Florida Statutes, do not supersede or overrule the common law definition of dwelling as it pertains to the offense of burglary. Following Judge Ervin's logic, the evidence in this case does not establish that the structure in which Appellant was arrested constituted a dwelling under the burglary statute. The structure had not been occupied for six months and the owner indicated he did not intend to reestablish his residence there (T 58, 59). The

owner hoped to sell or rent it but the water and telephone had been disconnected (T 58). Strict construction of the burglary statute would indicate that Appellant's case should be remanded for a judgment and sentence for burglary of a structure rather than burglary of a dwelling.

VI CONCLUSION

The evidence indicates that the structure in which Appellant was arrested was clearly not a dwelling under common law. If the 1982 amendments to the burglary statute do not supercede or abrogate common law, then Appellant's judgment and sentence for burglary of a dwelling should be remanded and reduced to reflect the lesser offense of burglary of a structure.

Kathryn L. Sands, P.A.

Kathryn L. Sands

KATHRYN L. SANDS
Florida Bar # 296791
353 East Forsyth Street
Jacksonville, Florida 32202
(904) 358-2337
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Honorable Bob Butterworth, Attorney General, The Capitol, Tallahassee, Florida, 32399-1050; and to Houston D. Perkins, No. 117198, Marion Correctional Institution, P.O. Box 158, Lowell, Florida 32663, on this 15th day of January, 1996.

Kathryn L. Sands
KATHRYN L. SANDS