ORIGINAL

FILED
SID J. WHITE
OCT 16 1996
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

88,890

STATE OF FLORIDA,

Petitioner,

v.

SAMMY STEVENS,

Respondent.

CASE NO. 95-02359

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, SAMMY STEVENS, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent, Mr. Stevens, was charged by Amended Information with automobile theft under §812.014(1)(a) and (b), Fla. Stat., and with theft of United States currency between $300 and $20,000 in violation of the same statutes. (Tr. 2-3)

Factually, the record and transcripts showed that Mr. Stevens purchased a Corvette automobile for $15,000, but changed the contract to a "lease/purchase" agreement due to credit concerns. (R. 6-10, Ex. 2) The defendant was required to put down a $7,000 deposit. (Tr. 18) The balance of the purchase price was to be financed over 60 months with First City Acceptance Corp. (Tr. 124)

Stevens gave the dealership two checks, one for $2,000 and one for $5,000, to cover the down payment. The $2,000 check bounced the first time it was deposited, but was paid the second time. (Tr. 113) The $5,000 check was simply no good. (Tr. 107)

Having obtained possession of the Corvette through the use of a bad check, Stevens never insured the car (as required) and kept the car without making payments. (T. 128, 134-38)

Stevens was sent a default letter which clearly stated he was to pay the amounts due or the vehicle would be taken back. (Tr. 134) Stevens, meanwhile, was in an accident with the vehicle, and the vehicle was placed in a body shop where it was not located by the

owners for seven months. The owners eventually obtained a writ of replevin. (Tr. 146, 162-63, 185-86) At no time did Stevens return the car or tell the victims where it was. The car was found in a paint and body shop by an investigator.

Stevens was tried by jury and convicted on Count I, although the trial court granted acquittal on the second theft count.

After the trial, Stevens filed a Motion for Acquittal (R. 98) which raised a novel defense. Stevens alleged that he was entitled, under §812.014 (3), Fla. Stat., to a written demand "by certified mail" for the return of the car, or he was not guilty of "theft."

A hearing was conducted on May 31, 1994, at which time a controversy arose over whether a written demand had been sent, and how it was sent. (R. 112-114) The Court and the State noted that this defense was never raised at trial (R. 110-114) and the Defendant argued that he did not waive the claim. Id.

The motion for acquittal was denied, and the Defendant appealed. The First District Court of Appeal granted relief (on rehearing), certifying the queston now before this Court.

SUMMARY OF ARGUMENT

ISSUE I.

The District Court's certified question is incomplete, as it merely asks whether a post-verdict motion for acquittal is possible; a point never disputed by anyone. The real issue is whether a motion for judgment of acquittal should be used as a device for arguing a novel affirmative defense, for which the trial developed no evidence; thus denying the State an opportunity to confront evidence, call witnesses or enjoy the normal protections guaranteed by the Constitution. It is submitted that a defendant has no right to try a case using one theory of defense and then move for acquittal, post-trial, on the theory that the State failed to preemptively disprove all possible alternative theories of defense whether asserted at trial or not.

ISSUE II.

Even if the defendant had some right to ambush the State with a post-trial alternative defense, the District Court should not have granted a motion for acquittal. The ruling on the motion necessitated the reweighing of evidence and the violation of virtually every legal standard governing motions for acquittal and appellate review thereof. The District Court imposed a novel and unsupported statutory interpretation on the State, and then applied

all disputed facts and inferences from those facts in favor of the Appellant rather than the judgment as required by law.

ARGUMENT

ISSUE I

MAY A GROUND FOR JUDGMENT OF ACQUITTAL BE ASSERTED FOR THE FIRST TIME IN A POST-TRIAL MOTION PURSUANT TO RULE 3.380(C)?

The case at bar involves a certified question which, unfortunately, does not precisely ask the intended, controlling question. As phrased, the question merely asks whether a post-verdict motion for judgment of acquittal can raise a ground for relief. The question is clearly inaccurate, since absent any ground for relief the motion would not have been filed in the first place.

The real issue, and the intended question, is the one discussed by the parties in the trial court and on appeal; to wit:

MAY A POST VERDICT MOTION FOR JUDGMENT OF ACQUITTAL BE PREDICATED ON AN AFFIRMATIVE DEFENSE OR THEORY OF DEFENSE NOT RELIED UPON OR ASSERTED AT TRIAL?

The only possible answer to this question is "no," since the alternative would radically alter the nature and purpose of motions for judgment of acquittal, and would place an impossible burden on the State.

A: Motions For Acquittal

A motion for judgment of acquittal is a challenge to the legal sufficiency of the evidence as presented at trial. It is not a vehicle for raising novel statutory or constitutional claims. The motion requires an examination of the evidence, with all facts and all inferences from the facts taken in favor of the State, to see if it would be possible for the jury to find guilt beyond a reasonable doubt. Lynch v. State, 293 So. 2d 44 (Fla. 1974); Spinkellink v. State, 313 So. 2d 666 (Fla. 1976); Lawson v. State, 666 So. 2d 193 (Fla. 2d DCA 1995); K.O. v. State, 673 So. 2d 47 (Fla. 4th DCA 1995).

An affirmative defense differs from a defense based upon the sufficiency of the evidence in that it involves the production of evidence or testimony which explains and justifies the defendant's conduct. Examples of an affirmative defense, of course, include "consent," "self defense," "claim of title," or even "lack of notice." The defendant comes forward with such evidence during the trial and the State, which also has due process rights, Georgia v. McCollum, __ U.S. __, 120 L. Ed. 2d 33 (1992); Payne v. Tennessee, 501 U.S. 808 (1991); Evans v. Bennett, 440 U.S. 1301 (1979); Snyder v. Massachusetts, 291 U.S. 97 (1934); State v. Jones, 204 So. 2d 515 (Fla. 1967); Thomas v. State, 326 So. 2d 413 (Fla.

1975), has the right to confront that evidence and test it by cross-examination or the presentation of rebuttal evidence.

In the case at bar, the defendant alleged that the State failed to prove that he had received a written demand for return of the "leased" vehicle and that said "demand" had to have been made by certified mail, citing §812.014(3) (actually, §812.014(4)). This argument involved the following considerations:

1) The Statute in question was a separate section of the "grand theft" statute, and involved an affirmative defense to the general crime of theft, in special circumstances. The elements of theft do not include having the victim beg for return of his or her property. Rather, the elements which must be proved are:

(A) That the defendant obtains or endeavors to obtain or use
(B) The property of another, without consent,
(C) With the intent to permanently or temporarily deprive the victim of the victim's right to or benefit from the property,
(D) Or appropriate the property to the defendant's own use.

See: Rios v. State, 660 So. 2d 795 (Fla. 5th DCA 1995).

In the case at bar, the State's evidence, viewed properly under a Motion for Acquittal, showed:

(A) The defendant purchased a Corvette using a 60-month lease/purchase contract. The intent of the contract and the

parties was to convey title to the defendant, thus distinguishing this contract from a simple lease.

(B) The defendant initially obtained possession of the car by using rubber checks. While the smaller check was eventually honored, the $5,000 check was no good.

(C) The defendant never made payments on the car until it was too late and repossession was in progress. Even then, he did not make good on the $5,000 check and only offered a dubious "partial payment" on his monthly payments.

(D) The defendant hid the car and forced the victims to spend months looking for it, even after the Replevin action, rather than return the car.

(E) The defendant did not allege or show that he had the right to simply take a Corvette from a car dealer and not pay for it, or that he reasonably thought he could pass bad checks and drive around in a car without making payments, or that he had the right to withhold the location of the car from his creditors even after issuance of a writ of replevin.

Thus, the motion for acquittal was properly denied.

After the trial, however, Stevens came up with a new theory. Stevens alleged that *if the contract was merely viewed as a lease,*

he was entitled to a written demand for the stolen car's return, *and that the demand had to be in the form of a certified letter.* The statute cited for this proposition states:

> Failure to comply with the terms of a lease when the lease is for a term of 1 year or longer shall not constitute a violation of this section unless demand for the return of the property leased has been made in writing and the lessee has failed to return the property within 7 days of his receipt of the demand for return of the property. A demand mailed by certified or registered mail, evidenced by return receipt, to the last known address of the lessee shall be deemed sufficient and equivalent to the demand having been received by the lessee, whether such demand shall be returned undelivered or not.

The "Motion for Acquittal" thus required the trial court:

1) To interpret the statute to see whether the "certified or registered mail" portion made use of such mail mandatory.

2) To interpret the statute to determine whether the only way of proving service of a written demand for return of the car was a receipt for registered mail (rather than a writ of replevin, a repossession letter, or admissions by the defendant himself).

3) To interpret the purchase/lease agreement to see whether it fell within the statutory deinition of a straight "lease."

4) To consider an affirmative defense of "lack of notice" without allowing the State to confront or rebut said affirmative defense.

Not one of these considerations properly fell within the scope of a motion for judgment of acquittal. The statutory interpretations involved were matters which clearly could and should have been raised in pretrial motions challenging the statute itself. The "no notice" affirmative defense should have been raised at trial, not sandbagged for a post-trial motion.

It should be remembered that the State's duty to prove a case beyond a resonable doubt does not require the State to preemptively rebut or disprove every imaginable theory of defense. Wright v. West, __ U.S. __, 120 L. Ed. 2d 225 (1992); Spinkellink, supra; K.O. v. State, supra. Under the decision at bar, however, the State would suffer that very burden, since it could be sandbagged by an affirmative defense or an alternate theory of defense concocted in support of a post-verdict motion for judgment of acquittal.

It is submitted that every defendant has to make strategic decisions regarding his or her theory of defense; sometimes having to elect between conflicting and even contradictory defenses. Defendants are not entitled to perpetual retrials until every possible theory of defense has been defeated. Nevertheless, the decision of the First District Court of Appeal allows defendants that very privilege by permitting them to go to trial on one theory

and then raise alternate theories in post-trial motions for acquittal. This decision was incorrect. Accordingly, the certified question, as restated herein, should be answered in the negative.

ISSUE II

DID THE DISTRICT COURT ERR IN HOLDING THAT THE POST TRIAL MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED?

The District Court held that the Respondent was entitled to acquittal on the basis of a mere theory (i.e., lack of notice) regarding an unproven affirmative defense, based upon a novel interpretation of a statute. The decision completely disregarded the elements of theft (under §812.014, Fla. Stat.), the standard of review governing appeals (all facts and inferences to be taken in favor of the judgent), see Spinkellink v. State, supra; Gilvin v. State, 418 So.2d 996 (Fla. 1982); Shapiro v. State, 390 So. 2d 344 (Fla. 1980), and the similar standard of review governing motions for judgment of acquittal. It is submitted that the District Court erred both procedurally and factually, and should be reversed.

The facts of the case, taken in a light favorable to the judgment, established the following:

1) The defendant purchased a Corvette under a "lease/purchase" agreement.

2) To obtain possession of the car, the defendant passed two worthless checks, the larger one of which he never made good.

3) The defendant never made payments on the car and never insured it.

4) The defendant had an accident in the car and did not properly notify the creditors.

5) The defendant received written notice of his default, including a demand for either payment or the car.

6) Not only did the defendant not pay, he never disclosed the whereabouts of the stolen car, which was located in a paint and body shop months later.

The reasonable *inferences* a jury could draw from the evidence were that the defendant obtained the car by trick, took off with it, never intended to pay for it, and hid the car in a paint and body shop in hopes of changing its appearance or making it unidentifiable to the creditors.

In response to this evidence and inferences, Mr. Stevens never alleged insanity, nor did he allege that he had some special right to pass bad checks, nor did he allege ignorance of the fact that if you purchase something you have to pay for it, nor did he allege ignorance of his moral or ethical obligation to return the car if he could not make payments. Thus, the statutory elements of grand theft were all established.

When the First District received this appeal, the Court was required to base its ruling on the record facts, with all

inferences and dsputes taken and resolved in favor of the judgment. This was simply not done. Accordingly:

1) The District Court reinterpreted the purchase contract as a straight "lease," thus ignoring the face of the contract and resolving alleged ambiguities in favor of the defendant rather than the judgment.

2) The District Court referred (page 3) to the defendant's conduct as merely an "alleged failure to perform"; implying that automobile retailers might "sell" (or even lease) Corvettes in exchange for rubber checks or a refusal to make monthly payments.

3) The District Court *agreed* that the victim sent written notice to the defendant, but ambiguously asserted that the notice "fell well short of compliance with the written demand specified by 812.014(3)." (Opinion at 4) This finding misinterpreted the statute, which only refers to certified or registered letters as a means of "proving" delivery of written demand, not as the only allowable "form" of demand; and it interprets the written demand provided by the victims in a manner favorable to the defendant rather than the judgment, as the law required.

4) The opinion characterizes the "demand" issue as a matter in avoidance, but then goes on to equate this avoidance with an "element of grand theft" to be preemptively disproven by the State.

This, again, implies that the crime of grand theft is contingent upon the victim begging to get his or her property back (and begging, by the way, in the approved manner) rather than being contingent on the intent and behavior of the defendant. This is clearly erroneous. Crime is not the fault of the victim, and the crime of "theft" does not include "begging for the return of the stolen goods" as an element of the offense. Rios v. State, supra.

That which the court passed off as a "matter of avoidance" is, in fact, an affirmative defense. In essence, the defense implies that the defendant was unaware of the fact he was not entitled to possession of the car, and, thus, had *no intent* to deprive the true owner of possession of, or benefit from, said car. The defense, in other words, is a rebuttal to the concept of criminal intent.

Lack of specific intent is an affirmative defense, and lack of "proper" notice (causing a lack of intent) is also an affirmative defense. A motion for acquittal is not to be granted on the basis of the State's alleged failure to preemptively disprove an unasserted affirmative defense. State v. Hicks, 421 So. 2d 510 (Fla. 1982); Kramer v. State, 617 So. 2d 274 (Fla. 1993).

Finally, the First District's decision to grant acquittal was based on an incorrect and extremely untenable construction of the statute. The crime is *theft*, and it is committed by the person who

stole the car, not the victim. The car, once stolen, is stolen property even if the victim does not demand it back "by certified letter, return receipt." The notice requirement of §§(4) does not require all written notices to be made by registered or certified mail. The Statute only refers to such mail as *a means of establishing service of the notice*.

The First District's interpretation of the statute was palpably erroneous. The Court, after acknowledging that the trial evidence established notice to the defendant, granted acquittal on the theft charge because the victim failed to use registered mail! Clearly this was not the intent of the Legislature in defining the offense or even the affirmative defense.

In sum, the District Court erred by granting acquittal without regard to the evidence, without regard for the proper interpretation of the evidence, and by means of an unnatural statutory construction which defied not only Legislative intent, but basic common sesnse. The decision should be reversed.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, and the decision of the First District Court of Appeal should be disapproved.

Respectfully submitted,

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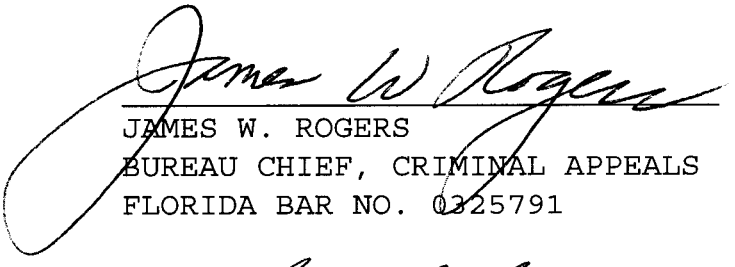

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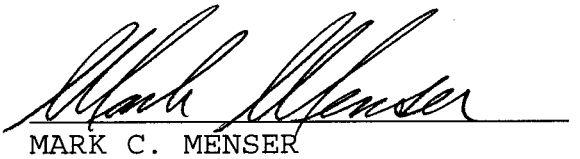

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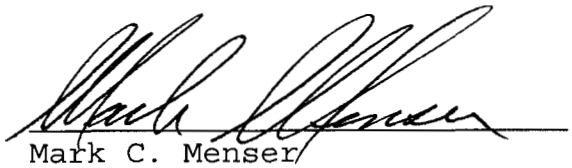
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S INITIAL BRIEF ON THE MERITS has been furnished by U.S. Mail to **MR. LEO THOMAS**, Esquire, Post Office Box 12308, Pensacola, Florida 32581-2308, this 16 day of October, 1996.



Mark C. Menser
Assistant Attorney General

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Appendix

95-111214 TCL

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

SAMMY E. STEVENS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-2359

_____/

Opinion filed August 12, 1996.

An appeal from Circuit Court for Escambia County.
Kim Skievaski, Judge.

Leo A. Thomas of Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A., Pensacola, for Appellant.

Robert A. Butterworth, Attorney General, and William J. Bakstran, Assistant Attorney General, Tallahassee, for Appellee.

ALLEN, J.

The appellant challenges his conviction for grand theft of an automobile. He argues that his post-trial motion for judgment of acquittal should have been granted because the state did not prove that a written demand for return of the leased automobile was made, as required by section 812.014(3), Florida Statutes (1993). We agree and reverse.

Section 812.014(3), a subsection of the theft statute, provides:

> (3) Failure to comply with the terms of a lease when the lease is for a term of 1 year or longer shall not constitute a violation of this section unless demand for the return of the property leased has been made in writing and the lessee has failed to return the property within 7 days of his receipt of the demand for return of the property. A demand mailed by certified or registered mail, evidenced by return receipt, to the last known address of the lessee shall be deemed sufficient and equivalent to the demand having been received by the lessee, whether such demand shall be returned undelivered or not.

Although the appellant contends that this subsection sets forth a statutory element to be proven by the state, we conclude that the portion of this subsection preceding the word "unless" prescribes a defense to the crime of theft. The general rule for determining whether a statutory exception is an element of a statutory offense or a defense was set forth in Baeumel v. State, 26 Fla. 71, 7 So. 371 (1890), as follows:

> . . . In a statutory offense, it depends very much, though not exclusively, on the words of the statute, whether a particular matter is one of defense, or whether the negative of the matter enters into the definition of the crime. Therefore, as a general rule, we have what has already been laid down, namely, 'if there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or a subsequent statute, that is a matter of defense, and is to be shown by the other party.'

26 Fla. at 75, 7 So. at 372 (quoting Bishop 1 Criminal Procedure § 639); see also State v. Thompson, 390 So. 2d 715, 716 (Fla. 1980). Here, the exception is not in the enacting clause. It is set forth in a subsequent subsection of the statute. And nothing in subsection (1) or (2) of 812.014 suggests that the lack of an exception is an element of the offense. The opening portion of section 812.014(3) therefore prescribes a defense. Thompson, 390 So. 2d at 716; compare State v. Robarge, 450 So. 2d 855 (Fla. 1984).

The state properly concedes that the portion of the subsection beginning with the word "unless" sets forth a matter in avoidance. Therefore, even though the 812.014(3) defense might be established by the evidence in a prosecution for theft, it could still be avoided by the state proving beyond a reasonable doubt that written demand in compliance with the statute was submitted and that the property was not returned within the specified time.

Testimony presented at trial revealed that this case grew out of the appellant's alleged failure to comply with the terms of a multi-year lease of the automobile. In the absence of evidence to the contrary, this testimony established the 812.014(3) defense. Thus, the state bore the burden of proving the nonexistence of the defense beyond a reasonable doubt. Collett v. State, No. 95-2871 (Fla. 1st DCA July 9, 1996); Wright v. State, 442 So. 2d 1058, 1060 (Fla. 1st DCA 1983), rev. denied, 450 So. 2d 489 (Fla. 1984). But the state presented no evidence inconsistent with the defense.

Although there was evidence of a letter submitted to the appellant by the lessor of the automobile, it fell well short of compliance with the written demand specified by 812.014(3). Accordingly, upon proper motion, the appellant was entitled to judgment of acquittal.

The state argues that the appellant was not entitled to rely upon the 812.014(3) defense because the lease contract gave the appellant a purchase option. But the purchase option did not change the nature of the contract for purposes of the 812.014(3) defense.

The state also argues that the appellant was not entitled to rely upon the defense because he did not assert the defense at trial. Although it is true that the appellant first asserted the defense in his post-trial motion for judgment of acquittal, Florida Rule of Criminal Procedure 3.380(c) provides that a motion for judgment of acquittal "may be made or renewed within 10 days after reception of the verdict and the jury is discharged or such further time as the court may allow." (Emphasis added.) Because the post-trial motion for judgment of acquittal in this case was timely under the rule, we conclude that the defense was not waived.

Nevertheless, we note that although the "made or renewed" language has been part of rule 3.380(c) for over two decades, only one Florida decision, Jones v. State, 590 So. 2d 982 (Fla. 1st DCA 1991), disapproved on other grounds, State v. Jennings, 666 So. 2d 131 (Fla. 1995), has been cited in support of the proposition that ground for judgment of acquittal may be asserted for the first

time in a post-trial motion pursuant to rule 3.380(c). We therefore certify to the supreme court the following question of great public importance:

> MAY A GROUND FOR JUDGMENT OF ACQUITTAL BE ASSERTED FOR THE FIRST TIME IN A POST-TRIAL MOTION PURSUANT TO RULE 3.380(c)?

The appellant's conviction is reversed, and this case is remanded with instructions that the appellant be discharged.

WEBSTER and LAWRENCE, JJ., CONCUR.