

IN THE SUPREME COURT OF FLORIDA

DONALD LEE BRADLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 93,373

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New
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ARGUMENT

ISSUE I

WAS THE EVIDENCE LEGALLY AND REVERSIBLY INSUFFICIENT FOR ... (B) FELONY MURDER WHERE, PRIOR TO THE ENTRY INTO THE HOME, A CO-CONSPIRATOR HOME-OCCUPANT SPOUSE "CONSENTED" TO THE ENTRY FOR THE PURPOSE OF KILLING THE HOME-OCCUPANT VICTIM, AND, AFTER THE ENTRY, THE HOMICIDE VICTIM EXPRESSLY REVOKED ANY PURPORTED "CONSENT"? (Restated)

ISSUE III

WAS THE EVIDENCE LEGALLY AND REVERSIBLY INSUFFICIENT FOR BURGLARY WHERE, PRIOR TO THE ENTRY INTO THE HOME, A CO-CONSPIRATOR HOME-OCCUPANT SPOUSE "CONSENTED" TO THE ENTRY FOR THE PURPOSE OF KILLING THE HOME-OCCUPANT VICTIM, AND, AFTER THE ENTRY, THE HOMICIDE VICTIM EXPRESSLY REVOKED ANY PURPORTED "CONSENT"? (Restated)

ISSUE VII

WAS THERE SUFFICIENT EVIDENCE FOR THE AGGRAVATOR THAT THE MURDER WAS COMMITTED DURING A BURGLARY? (Restated)

This Supplemental Brief concerns Delgado v. State, 25 Fla. L. Weekly S79, FSC #88,638 (Fla. Feb. 3, 2000), and aspects of its application in the instant and kindred cases.

The State here does not belabor the arguments in its pending Delgado Motion for Rehearing, as such,¹ but the State respectfully submits that the facts of this case highlight the error in Delgado's holding that the State must prove that the

¹ The State also does not belabor its Answer-Brief positions (a) that, due to sufficient evidence of Premeditation (See Answer Brief 27-47), the viability of Felony Murder theory in this case is unnecessary for the resolution of ISSUE I (See Answer Brief 56-60) and (b) that, as a matter of trial strategy, defense counsel waived the sufficiency claims (See Answer Brief 11-19). However, it maintains those positions.

defendant surreptitiously remained in a structure in order for there to be an unlawful remaining for purposes of Burglary.

Delgado repeatedly expressed a concern that the legislature did not intend for an otherwise consensual entry to automatically become a Burglary when the victim is simply aware of the commission of any crime inside, such as smoking marijuana. Here, in contrast, Jack Jones, the murder-victim, **explicitly ordered the intruders out of his home and attempted to physically repel them**. Delgado's concern about elevating virtually any offense committed inside the premises after a consensual entry is not present under the facts of the instant case. This case illustrates that Delgado's insertion of "surreptitious" into the statute to exclude from its application horrible hypotheticals, such as a resident's mere awareness of smoking marijuana, was overly broad, broad well-beyond legislative intent.

It could not have been the legislature's intent for Burglary to apply to a **surreptitious shoplifter** who remains inside after-hours but not to apply to a defendant who remains inside for the sole purpose of killing a resident and who is explicitly ordered to get out. Burglary applies to both. A key in both instances is that the defendant remained in the structure without authorization. Here, there is no **inferred revocation** of whatever "consent" may have been conferred by the co-conspirator occupant. Revocation was explicit.

Further, as the State argued in its Answer Brief (pp. 49-51, 52-53), this case deals with Burglary of a **home**, which, as a

matter of legislative intent and public policy, is the **penultimate sanctuary of legally protected privacy**. Jack was entitled to his privacy and his sanctuary vis-a-vis armed intruders, especially Bradley, whose only intent in entering was to injure and kill Jack.

In situations where the initial entry was "consensual," **Delgado has essentially and incorrectly reduced Burglary to a property crime**. If Bradley had "consensually" entered and hid himself in a closet until Jack slept, then killed him, Bradley would be guilty of Burglary under Delgado. However, under Delgado, if Bradley and accomplices brazenly (non-surreptitiously) remained by terrorizing Jack prior to killing him, then they committed no Burglary. The legislature could not have intended for one who terrorizes to be less criminally liable than one who does not. Giving full, meaningful effect to the statutes' "remaining" concept requires it to be applied to both situations.

Applying the same reasoning to a kindred non-homicide situation, the non-surreptitious defendant who remains in the dwelling for the purpose of emptying the house and for the purpose of terrorizing the victim-resident by threatening to kill and rape the resident violates the sanctity and privacy of the home more than surreptitious defendant who merely hides in the closet and empties the home of its valuables while the resident sleeps.

Also, Delgado makes initial "consent" binding throughout the duration of the defendant's occupancy. In so doing, again Delgado totally ignores the full import of the legislative intent that a home is a sanctuary. Consent, here malevolently obtained consent, should not be **forever irrevocable** by a resident during the duration of the defendant's occupancy. The right to control this ultimate sanctuary of the home does not irrevocably end when the defendant crosses the threshold of the front door. Here, Jack exercised his right to his sanctuary by revoking whatever "consent" had been given.

If the Court maintains its Delgado position that surreptitious behavior is required for unlawful remaining, the State submits that, if the merits are reached, they nevertheless have none for two reasons.

First, as it argued in its Answer Brief (pp. 51-55), the initial consent was void ab initio because it was given by a co-conspirator for the sole purpose of committing an offense inside the premises, here the offense most detested by society, i.e., murder. Bradley should not be allowed to play "gotcha" with Jack's privacy interest in the sanctuary of his own home. In other situations, if the defendant defrauds the home resident by representing his intent to enter to repair a sink, when the defendant was, in fact, not a repairman at all, and the defendant's intent was to empty the home of all of its belongings and violently terrorize the home owner, the defendant should not obtain any benefit from his fraud.

Where the "consent" was for the sole purpose of murdering the home-resident victim, as here, and where the "consent" was obtained by fraud, any purported "consent" is void ab initio as a matter of legislative intent and public policy. In either case, the law should not sanction the "consent" by giving it any legal effect. Otherwise, the law becomes a partner in the fraud, which could not possibly be legislative intent.

Second, if the Court maintains its position that surreptitious remaining is required for Burglary where there has been any consent by anyone, here the nighttime, ski-masked remaining in the house satisfies that surreptitious requirement.

CONCLUSION

Based on the foregoing discussions and those in the State's Answer Brief on the pertinent issues, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Answer Brief has been furnished by U.S. Mail to Nada Carey, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 17th day of March, 2000.

Stephen R. White
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[AGO# L98-2-1149 --- 3/6/01,10:51 am]