OA 6-7-99

IN THE SUPREME COURT OF FLORIDA

DARYELL CALLIAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,592

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Daryell Calliar, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as petitioner or by proper name.

The record on appeal consists of three volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. "IB" will designate petitioner's Initial Brief, followed by any appropriate page number.

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

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

JURISDICTION

The State acknowledges that there appears to be conflict between Hierro v. State, 608 So.2d 912 (Fla. 3d DCA 1992) and the decision of the lower tribunal in the case at bar Calliar v. State, 714 So.2d 1134 (Fla. 1st DCA 1998).

STATEMENT OF THE CASE AND FACTS

The State agrees with petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I.

The State presented sufficient evidence that petitioner possessed burglary tools. Burglary involves not only an entry into the premises of another, but also involves an intent to commit an offense within those premises. Thus, by definition, a burglary tool is one that is used either to gain entry into the premises or to commit the underlying offense therein. In the case at bar, petitioner used the tool in an attempt to commit the underlying offense of theft while within the premises. For that reason, the tool was by definition a burglary tool. Accordingly, the First District Court's affirmation of petitioner's conviction for the possession of burglary tools should be upheld.

ARGUMENT

ISSUE I

DID THE FIRST DISTRICT COURT OF APPEAL PROPERLY AFFIRM DEFENDANT'S CONVICTION FOR POSSESSION OF BURGLARY TOOLS? (Restated)

Petitioner was charged and convicted of burglary, possession of burglary tools, and resisting an officer without violence. (IB: 1)

Petitioner contends that the First District Court of Appeal erred by affirming his conviction for possession of burglary tools. In particular, he argues that the applicable statute § 810.06 Fla. Stat. (Supp 1996) defines burglary tool as that used to gain entry and not a tool used in the commission of the underlying felony. Thus, petitioner claims, because the evidence supports that he intended to use the tool to commit the underlying theft, it cannot be a burglary tool.

The standard of review is whether the trial court abused its discretion by finding substantial competent evidence sufficient to withstand the motion for judgment of acquittal. Moore v. State, 537 So. 2d 693 (Fla. 1st DCA 1989); Barnett v. State, 444 So. 2d 967, 969 (Fla. 1st DCA 1983); Terry v. State, 668 So. 2d 954, 964 (Fla. 1996).

Petitioner bears the burden of showing that error occurred. According to statute:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Section 924.051(7), Fla. Stat. (Supp. 1996); see also, Savage v. State, 156 So. 2d 566, 568 (Fla. 1st DCA 1963)(Judgments are presumed to be correct, and appellants carry the burden clearly to demonstrate harmful error arising from actions of the trial judge in the proceedings below.).

Where there is a motion for a judgment of acquittal, the moving party "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). Later, in Tibbs v. State, 397 So.2d 1120 (Fla. 1981), the Florida Supreme Court reaffirmed:

> an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.

(Footnotes omitted.)

As discussed below, the State asserts and the First District Court agrees that burglary involves not only an

entry into the premises of another, but also involves an intent to commit an offense within those premises.

Florida Statutes provide, in pertinent part, that:

> **Whoever has in his possession any tool,** machine, or implement **with intent to use the same,** or allow the same to be used, **to commit any burglary** or trespass shall be guilty of a felony of the third degree....

Section 810.06, Fla. Stat. (1995). Florida Statutes further define burglary as follows:

> "Burglary" means **entering or remaining in** a dwelling, a structure, or a conveyance **with the intent to commit an offense therein....**

Section 810.02(1), Fla. Stat. (1995). Thus, by definition, a burglary tool is one that a perpetrator intends to use to enable him either to (1) gain entry or remain within the premises; or (2) commit an offense while within the premises.

In the case at bar, the State presented sufficient evidence that petitioner possessed a tool that he not only intended to use but actually used during commission of the burglary. In particular, the State presented testimony from an eyewitness who observed petitioner using wire cutters to remove a chain that secured a bicycle to a bicycle rack located on the premises. (IB: 1; II: 128,130). Thus, the State presented direct evidence that petitioner used the wire cutters in an attempt to commit the underlying offense of theft and, therefore, presented direct evidence of actual use of a

burglary tool. Petitioner's reasoning, that a burglary tool must have been used to gain entry, is lacking at several levels.

Petitioner professes that the wirecutters cannot constitute a burglary tool if he intended to use them to commit the underlying theft rather than to gain entry.[1] Yet, at the same time, petitioner concedes, "The burglary at issue was complete as soon a petitioner entered the fenced area containing the bike racks." (IB-7). In other words the burglary was **committed** at the point petitioner entered with the intent to commit the underlying theft. (IB-7). Thus, it reasonably follows that at the point the act constituted a burglary, any tool intended for the commission of the underlying offense, became a burglary tool. The petitioner cites the holding in Hierro v. State, 608 So.2d 912 (Fla. 3d DCA 1992)[2], which stated that the screwdriver defendant used to steal a car by breaking the steering column and starting the engine was not a burglary tool because it was not used to gain entry into the car and therefore,

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[1] It could be argued that the same wire cutters could have been utilized to gain entry to the fenced yard had the gate been locked.

[2] It should be noted that there is a significant distinction between Hierro v. State and the case at bar. In Hierro, although the defendant was charged with the possession of burglary tools he was not charged with burglary. He was charged and convicted of stealing a car.

not used to commit an enumerated offense under section 810.06. This reasoning was rejected by the First District in the case below:

> The analysis in Hierro ignores the fact that the intent to commit the theft at the time of the illegal entry is an element of the crime of burglary. The two charges should not be treated as separate incidents, but rather as one criminal episode with a unified intent. Section 810.06, Florida Statutes (1995), provides in pertinent part that
>
> [w]hoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass shall be guilty of a felony of the third degree....
>
> Florida Statutes define burglary as follows:
>
> "Burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein....
>
> § 810.02(1), Fla. Stat. (1995). Thus, by definition, a burglary tool may be one that a perpetrator intends to use to enable him to gain entry or remain within the premises, or may be a tool which the perpetrator intends to use to commit an offense while within the premises.

Calliar v. State, 714 So.2d 1134, 1135 (Fla. 1st DCA 1998). Moreover, upholding Hierro could foreseeably require the statutory cataloging under § 810.06, Fla. Stat. (1995) of all underlying offenses that may possibly be committed using a tool. Furthermore, because theft constitutes an element of the burglary offense, appellant could not have been convicted of both burglary and the underlying theft offenses. Therefore, it follows that a

tool intended for the commission of any element of an offense constitutes a tool for the commission of the enumerated offense as a whole.

Accordingly, because the petitioner has failed to show that the trial court abused its discretion, the holding of the First District Court should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal reported at 714 So. 2d 1134 should be approved, and the decision in Hierro v. State, 608 So.2d 912 (Fla. 3d DCA 1992) disapproved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR RESPONDENT
[AGO# L98-1-8872]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Mark Walker, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 15th day of January, 1999.

Sherri Tolar Rollison
Attorney for State of Florida

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