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IN THE SUPREME COURT OF FLORIDA

DARYELL CALLIAR,	:	
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Petitioner,	:	
	:	
v.	:	CASE NO. 93,592
	:	
STATE OF FLORIDA,	:	
	:	
Respondent.	:	

_____ /

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

DARYELL CALLIAR,

Petitioner,

v.

CASE NO. 93,592

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

I. STATEMENT OF THE CASE AND FACTS

The pertinent facts are these. A middle school teacher observed petitioner attempting to cut the chain of a bicycle with wire cutters and/or a screwdriver. The bicycle was chained to a rack located within a fenced area of the school. Petitioner entered the fenced area through an open gate. The lock to the gate was undamaged. Following a trial by jury, petitioner was convicted of possession of burglary tools in violation of section 810.06, Florida Statutes (1995).¹

Petitioner appealed his conviction for possession of burglary tools, relying on Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992), wherein the Third District Court of Appeal held that section 810.06 proscribes the possession with intent to use a tool to commit a burglary or trespass but that section 810.06

¹ Petitioner was also convicted of burglary of an occupied structure and resisting an officer without violence.

does not proscribe the possession with intent to use a tool to commit a theft.² The State responded that Hierro was wrongfully decided. The First District Court of Appeal agreed, ruling that

Hierro appears to hold that a person who intends to utilize tools to perpetrate a theft during the commission of a burglary cannot be convicted of possession of burglary tools. See Hierro, supra at 915. 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 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, 23 Fla. L. Weekly D1674, 1674-75 (Fla. 1st DCA July 15, 1998). Judge Joanas dissented, reasoning that

² Petitioner also appealed his conviction for resisting an officer without violence.

the interpretation of the language of Section 810.06, Florida Statutes, regarding burglary tools, set out in Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992), is more reasonable than the one offered by my colleagues in the majority opinion. However, assuming that the statute can be reasonably interpreted both ways, we must construe the provision most favorably to the accused. See § 775.021(1), Fla. Stat. (1995). The conviction on the charge of possession of burglary tools should be reversed.

Id. at D1675.

Petitioner sought review in this Court arguing that the First District's decision in the instant case expressly and directly conflicts with the Third District's decision in Hierro. This Court accepted jurisdiction over this case by order dated December 10, 1998.

II. SUMMARY OF THE ARGUMENT

Petitioner was convicted of one count of possession of burglary tools in violation of section 810.06, Florida Statutes (1995). Petitioner appealed. The First District Court of Appeal affirmed his conviction. Calliar v. State, 23 Fla. L. Weekly D1674, 1674-75 (Fla. 1st DCA July 15, 1998).

By its plain language, section 810.06 only proscribes the possession with intent to use a tool to commit any burglary or trespass. Section 810.06 does not proscribe the possession with intent to use a tool to commit a theft. In the case at bar, the State presented no evidence from which the jury could find that petitioner intended to use the wire cutters and/or screwdriver to commit a burglary or trespass. At most, the evidence supports a finding that petitioner intended to use the tools to commit a theft. At the very least, section 810.06 is ambiguous with respect to whether a defendant can be convicted of possession of a burglary tool for possessing a tool with the intent to use the tool to commit the underlying offense of theft. To the extent section 810.06 is susceptible to differing interpretations, section 810.06 must be construed most favorably to petitioner. See § 775.021(1), Fla. Stat. (1995). In affirming petitioner's conviction, the First District erred in holding otherwise. Accordingly, this Court should quash the decision below and remand with appropriate directions.

III. DISCUSSION

ISSUE: THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING PETITIONER'S CONVICTION FOR POSSESSION OF BURGLARY TOOLS BECAUSE NO EVIDENCE WAS PRESENTED FROM WHICH THE JURY COULD FIND THAT PETITIONER USED, OR INTENDED TO USE, TOOLS TO COMMIT A BURGLARY OR TRESPASS.

Section 810.06, Florida Statutes (1995), provides:

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, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(Emphasis added). By its plain language, section 810.06 only proscribes the possession with intent to use a tool to commit any burglary or trespass. Section 810.06 does not proscribe the possession with intent to use a tool to commit a theft. In Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992), the Third District so construed section 810.06:

Third, defendant was charged with possession of burglary tools in violation of section 810.06, Florida Statutes (1991). The statute provides, "[w]hoever has in his possession any tool, machine, or implement with intent to use the same . . . to commit any burglary or trespass shall be guilty of a felony of the third degree" (Emphasis added). The statute thus requires proof "not merely that the accused intended to commit a burglary or trespass while those tools were in his possession, but that the accused actually intended to use those tools to perpetrate the crime." Thomas v. State, 531 So. 2d 708, 709 (Fla. 1988) (emphasis added).

Here, the defendant was charged with stealing a car. He was also charged with

possessing a screwdriver as a burglary tool. The screwdriver was found in the vehicle near the driver's seat. There was testimony at trial from which the jury could find that the screwdriver was used to break the steering column and/or start the vehicle.

While the testimony provided a basis on which the jury could find that the screwdriver was used to effectuate the theft of the vehicle, theft is not one of the offenses enumerated in section 810.06. In order for the State to establish that the screwdriver was a burglary tool, the State needed to adduce testimony showing that the defendant used, or actually intended to use, the screwdriver to commit a burglary or trespass. Id.; see Secs. 810.02, 810.06, 810.08, Fla. Stat. (1991). There was no evidence at trial from which the jury could find that the defendant used the screwdriver to gain entry to the vehicle, nor evidence from which the jury could determine that the defendant possessed the screwdriver with the intent to use it to gain entry to the vehicle. That being so, the conviction under section 810.06 must be reversed.

608 So.2d at 915.

In the case at bar it is undisputed that (1) the gate to the fenced area containing the school's bike racks was open, and (2) the lock to the gate was undamaged. There was no evidence presented at trial from which the jury could find that petitioner used the wire cutters or screwdriver to gain entry to the area containing the school's bike racks, nor evidence from which the jury could determine that petitioner possessed the wire cutters and screwdriver with the intent to use them to gain entry to the area containing the school's bike racks. At most, the evidence supports a finding that petitioner possessed the wire cutters and/or screwdriver with the intent to commit a theft -- to steal

a bike. Thus, there was no evidence from which the jury could find petitioner guilty of possession of burglary tools. See Hierro.

It is no answer that the intent to commit the theft at the time of the alleged entry is an element of the crime of burglary. Section 810.02(1), Florida Statutes (1995), defines burglary to mean "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein" Under the plain language of section 810.02(1), petitioner did not have to commit the underlying offense of theft in order to commit burglary; rather, petitioner need only have intended to commit the underlying offense of theft. The burglary at issue was complete as soon as petitioner entered the fenced area containing the bike racks. See State v. Stephens, 601 So. 2d 1195, 1197 (Fla. 1992) (recognizing that a burglary is "complete" once a defendant enters a conveyance with the requisite intent). Petitioner thus did not use, or intend to use, the wire cutters to commit burglary. That being so, there was no evidence from which the jury could find petitioner guilty of possession of burglary tools.

At the very least, section 810.06 is ambiguous with respect to whether a defendant can be convicted of possession of a burglary tool for possessing a tool with the intent to use the tool to commit the underlying offense of theft. To the extent section 810.06 is susceptible to differing interpretations, this Court must construe section 810.06 most favorably to petitioner.

See § 775.021(1), Fla. Stat. (1995).

Accordingly, this Court should quash the decision below with respect to petitioner's conviction for possession of burglary tools and remand with appropriate directions.

IV. CONCLUSION

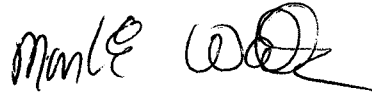
Based upon the foregoing argument, reasoning, and citation of authority, petitioner respectfully requests that this Court quash the First District's decision with respect to the possession of burglary tools conviction, approve the Third District's decision in Hierro, and remand with appropriate directions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to J. Ray Poole, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 29th day of December, 1998.

Respectfully submitted,

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