IN THE SUPREME COURT OF FLORIDA

TERRELL CURTIS DREW,

Petitioner/Appellant,

vs. Case No. 95,785
2d DCA Case No. 98-0877

STATE OF FLORIDA,

Respondent/Appellee.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12 point courier-New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

The Respondent State of Florida accepts as substantially correct the statements of case and fact presented by the Petitioner, Terrell Curtis Drew.

SUMMARY OF THE ARGUMENT

The undisputed facts legally support the conclusion that Terrell Curtis Drew "entered the conveyance," within the meaning of Florida's burglary statute, and that the State presented a prima facie case of guilt against Appellant for burglary of a conveyance. Thus, the trial court's order denying the motion to dismiss was properly dismissed and the district court of appeal's decision to affirm also was proper. Therefore, based upon the argument presented herein, it is respectfully submitted that the decision sought to be reviewed be considered on its merits and approved by this Court.

ARGUMENT

ISSUE

WHETHER THE LOWER COURT PROPERLY DENIED THE MOTION TO DISMISS WHEN THE REMOVAL OF A MOTOR VEHICLE'S LUG NUTS FOLLOWED BY THE REMOVAL OF THE WHEELS AND TIRES FROM THE VEHICLE AND SUBSEQUENT THEFT OF THOSE ITEMS CONSTITUTE AN ENTERING FOR THE PURPOSE OF CREATING A PRIMA FACIE CASE OF BURGLARY OF A CONVEYANCE?

(As stated by Respondent/Appellee)

The trial court properly dismissed the motion to dismiss because, legally, a burglary had been committed. Florida Statutes, section 810.02 defines "burglary" as "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). There are three essential elements of burglary: (1) a knowing entry into a conveyance; (2) knowledge that such entry is without permission; and (3) criminal intent to commit an offense within such a conveyance. T.S.J. v. State, 439 So. 2d 966 (Fla. 1st DCA 1983). The essential issue herein becomes whether the facts in this case support the State's assertion that Appellant "entered" the conveyance within the meaning of the burglary statute. It is the position of the Respondent that the facts clearly demonstrated a prima facie case against Appellant for the crime of burglary of a conveyance.

The undisputed facts, as adduced from the record, indicate that appellant admitted that he was using a lug wrench to remove lug nuts from a 1987 four-door, reddish-brown Chevy. (T. 208). Deputy Osgic testified that the appellant appeared nervous and was carrying a lug wrench. (T. 207). According to the deputy, the appellant, after being read his Miranda rights, told the deputy that he had stolen the tires off the reddish brown Chevy. (T. 210). Although Appellant apparently had not disturbed the vehicle's hood, trunk, doors or windows, the vehicle was missing three tires, rims, and lug nuts. (T. 220). Therefore, the wheels and tires had been dismantled from the vehicle. In order to dismantle the vehicle, it had to be entered into by the removal of the lug nuts that kept the tires and wheels in place.

According to section 810.011(3), Florida Statutes (1995), a "conveyance" is defined as "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car." To enter a conveyance includes taking apart any portion of the conveyance. By its plain language, the burglary statute makes it a crime to take apart *any* portion of a motor vehicle. Thus, by removing the vehicle's lug nuts to get to the tires and rims, Mr. Drew clearly entered the vehicle in question. This intrusion plainly violated the possessory interest of the vehicle's owner, Mack Lewis, owner

of Mack Lewis Auto Sales. See: State v. Word, 711 So. 2d 1240 (Fla. 2d DCA 1998).

Although Appellant argued that the stealing of hubcaps in State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979), which did not constitute burglary, is analogous to the instant case, this holding is distinguishable from the line of Florida cases addressing "entry" within the meaning of the statute. In Greger v. State, 458 So. 2d 858, 860 (Fla. 3d DCA 1984), an entry was found when the defendant removed the cowling, the fiberglass portion covering an outboard motor, and began loosening bolts from the motor that was attached to the transom of the boat. In Greger, though no portion of the defendant's body entered the conveyance, an "entry" was nevertheless found. This entry, unlike in Hankins, was based on the defendant's disassembly or taking apart a portion of the conveyance, to-wit, loosening bolts from a protruding motor. Id.

In comparison, an "entry" was similarly found in Braswell v. State, 671 So. 2d 228 (Fla. 1st DCA 1996), where the defendant reached into the open bed of a pickup truck, unfastened a bungee cord and removed a cooler. The Court held in Braswell, that the defendant "entered" the conveyance, within the meaning of the statute, simply by reaching into the bed compartment of the truck and removing personal property. Id. at 229. As the Court noted,

consistent with Florida decisional law in its interpretation of the burglary statute, "entry of only a portion of a defendant's body into a conveyance is sufficient proof of burglary." Id. Thus, "[r]eaching into the back bed of a pickup truck to remove a secured cooler is, in our judgment, properly considered a partial entry into the vehicle by the defendant and is more analogous to removing a radiator or starter from an engine compartment[1] than taking a hubcap from a tire's exterior or siphoning gas from a gas tank[2], neither of which involves entry by any part of one's body into a vehicle." Id. at 229-230. See also Zipperer v. State, 481 So. 2d 991 (Fla. 5th DCA 1986) (Upchurch, J., dissenting) (reaching over the side of a pickup truck and removing "unsecured" items from the open bed was an "entry" within the meaning of the burglary statute).

These later decisions, as distinguished from Hankins, whether viewed from the perspective of "disassembly" or "partial entry" or both, clearly support the entry in the instant case. Indeed, removing lug nuts and dismantling wheels and tires from a vehicle is more analogous to loosening bolts in an attempt to dismantle an outboard motor from a boat than taking a tire's hubcap. Thus,

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[1] State v. Harvey, 403 So. 2d 630 (Fla. 2d DCA 1981).

[2] R.E.S. v. State, 396 So. 2d 1219 (Fla. 1st DCA 1981).

following the law in Greger and Word v. State, once Appellant began taking apart a portion of the conveyance, to-wit, removing the lug nuts and taking off the wheels and tires, he entered the vehicle.

Moreover, following Braswell and Zipperer, it can also be said that Appellant "partially" entered the vehicle. Here, by reaching into the vehicle's wheel drums to pull the wheels off the axle, a part of Appellant's body entered a compartment of the vehicle. According to State v. Word,: "It is clear from a plain reading of the language of the statute that by removing the wheels and tires of the automobile, [the defendant] entered the vehicle by taking apart a portion of the conveyance." Therefore, by the plain meaning of the statute, the petitioner unlawfully entered a conveyance (by first removing the lug nuts followed by the dismantling and removing of the wheels and tires from the vehicle), the property of Mack Lewis Auto Sales, with the intent to commit theft.

Moreover, the Florida jury instructions for burglary define a conveyance to include a vehicle and, in addition, provide enteriing a conveyance includes taking apart any portion of the conveyance. In any event, the instant case is similar to Bragg v. State, 371 So. 2d 1082 (Fla. 4th DCA 1979), where the court held that an "entry" was taking apart any portion of a conveyance. In Bragg,

the defendant opened the hood of a car and removed a battery. This was no different then when Mr. Drew removed the vehicle's lug nuts to remove the vehicle's rims and wheels. Mr. Drew's removal of the lug nuts to further steal the wheels and tires of the vehicle was properly held to be an entering for the purposes of burglary. Accordingly, the trial court was correct in denying the motion to dismiss.

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Court should affirm the decision of the Second District Court of Appeal, as to the holding relating to the certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Brad Permar, Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, FL 33831 on this _29th_ day of July, 1999.

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OF COUNSEL FOR RESPONDENT/APPELLEE