IN THE SUPREME COURT OF FLORIDA

TERRELL CURTIS DREW,

Petitioner,

vs. FSC CASE NO. 95,785
DCA NO. 98-0877

STATE OF FLORIDA,

Respondent.
_____/

ON APPLICATION FOR DISCRETIONARY REVIEW
OF A DECISION OF THE SECOND
DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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TABLE OF CONTENTS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief, with the exception of the title page, is 12 point Century Schoolbook, a font which is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

On August 5, 1997, Petitioner Terrell C. Drew and a co-Defendant, Willie D. Wright, were charged by Information with the offenses of burglary of a conveyance, petit theft, and possession of burglary tools, in violation of sections 810.02(4), 812.014(3) and 810.06, Florida Statutes, respectively (R 3-5).[1] All such charges arose out of the petit theft of some tires from a motor vehicle found on a used car lot.

On October 3, 1997, a Motion to Dismiss Count I (burglary) and Count III (possession of burglary tools) was filed on behalf of the Petitioner (R 7-9). The gravamen of this motion was that the undisputed material facts: i.e., that Petitioner removed three tires from a motor vehicle with a lug wrench without the owner's permission, did not constitute a prima facie case of guilt as to Counts I and III (R 7).

Following the filing of a Traverse by the State of Florida on October 24, 1997 (R 10-12), the matter came on for hearing before the Honorable Susan Wadsworth Roberts on October 27, 1997 (R 13-30). After hearing argument from the parties, the trial court reserved ruling on the motion (R 27). On November 10, 1997, the trial court entered its Order on Motion to Dismiss, denying the Petitioner's Motion to Dismiss (R 31-32).

Jury selection commenced on November 24, 1997 (T 1, 3).[2] After a jury was selected from the panel for the trial of another case (T 4, 129), jury selection for Petitioner's trial was conducted (T 131-177). The jurors selected for Petitioner's trial were excused without being sworn and advised to return to the courtroom on November 26, 1997, for the commencement of Petitioner's trial (T 175-177).

On November 26, 1997, Petitioner's jury was sworn (T 194). Following an opening statement made by the prosecutor (T 200-201), counsel for the Petitioner advised the jury in pertinent part as follows:

Ladies and gentlemen of the jury, I'm going to tell you something very interesting right now. I'm going to tell you something that you probably didn't expect to hear at a trial, and that is that Mr. Drew sits before you a guilty person. He is guilty of Count II of the information. He is guilty of petit theft. He took the tires off the car. The reason why you are here today is to decide whether or not he is guilty of burglary and possession of burglary tools.

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[1] (R -) refers to the Record on Appeal in this case.
[2] (T -) refers to the Trial Transcript in this case.

(T 201).
Three witnesses testified on behalf of the prosecution. The first witness was Polk County Sheriff's Deputy James Osgic (T 202-216). Osgic testified that he was on patrol on July 14, 1997. At approximately 11:00 p.m., he observed the Petitioner (and a second individual later identified as the co-Defendant) in the vicinity of Mack Lewis Auto Sales (T 203-206). The Petitioner, who appeared nervous, was carrying a lug wrench (T 207).
When asked what he was doing, Petitioner admitted that he was using the lug wrench to remove lug nuts (T 208). Petitioner then produced some lug nuts taken from a 1987 brownish-red Chevy parked behind the business (T 207-209). Thereafter, Petitioner and the co-Defendant directed Deputy Osgic to the vehicle (T 209).
Following his arrest, Petitioner admitted that he removed some tires from the subject vehicle with the assistance of the co-Defendant (T 210). During cross-examination, the witness agreed that a lug wrench is a tool commonly found in cars (T 212-213).
The next witness to testify for the State was Polk County Sheriff's Deputy Virgil Cardin (T 217-218). Cardin transported the victim to the scene so that he could identify the subject tires (T 217-218).
The last witness to testify on behalf of the State was Mack Lewis (T 218-226). Lewis testified that he was the owner of Mack Lewis Auto Sales on July 14, 1997 (T 219). He was requested to go to the lot between 11:00 and midnight on July 14 to identify a vehicle and some tires (T 219-220). Lewis estimated the value of the three tires and rims, and some lug nuts to be about $250 (T 223).
After the prosecution rested its case-in-chief (T 226), Petitioner moved for a judgment of acquittal as to all offenses charged, specifically arguing the same grounds as previously presented in the Motion to Dismiss as to Counts I and III (T 227-233). All such motions were denied by the trial court (T 232-233). Thereafter, the defense rested its case-in-chief, then renewed all motions previously made (T 269).
Following closing arguments by the parties (T 275-284) and the delivery of jury instructions by the court (T 284-300), the jury retired to deliberate (T 300). Thereafter, the jury returned guilty verdicts as charged (T 302).
On December 17, 1997, Petitioner filed an Amendment to the Defendant's Motion for Judgment of Acquittal on Counts One and Three (R 35). This motion was denied in an Order on Renewed Motion for Judgment of Acquittal dated February 20, 1997 (R 89).
Subsequently, Petitioner was adjudicated guilty of all offenses and sentenced to 364 days in the county jail with credit for time served on Count I; to time served on Count II; and to 364 days in the county jail on Count III, all such sentences to run concurrent with each other (R 76-77, 88).
A timely direct appeal followed (R 91). After the submission of briefs and oral argument by the parties, the Second District Court of Appeal affirmed Petitioner's convictions and sentences in a decision dated May 14, 1999, which provides in pertinent part:
Affirmed. See State v. Word, 711 So. 2d 1240 (Fla. 2d DCA), cause dismissed, 718 So. 2d 173 (Fla. 1998). Conflict certified with State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979).

The timely proceeding seeking discretionary review by this Court follows.

SUMMARY OF ARGUMENT

Petitioner's conviction for three separate offenses based upon the undisputed facts that he intended to, and did in fact, commit a petit theft of some tires, rims and lug nuts defies logic and is contrary to the interests of justice. This Court should accept the invitation of the Second District Court of Appeal to exercise its authority to review a significant decision which is in certified conflict with a decision of another district court of appeal, namely State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979). Based upon the arguments presented herein, it is respectfully submitted that the decision sought to be reviewed be considered on its merits and disapproved by this Court.

ARGUMENT: THE DECISION SOUGHT TO BE REVIEWED SHOULD BE DISAPPROVED BY THIS COURT

Pursuant to Article V, Section 3(b)(4) of the Florida Constitution, this Court:
May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

Additional authority for such discretionary review is found in Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(vi).
In State v. Word, 711 So. 2d 1240 (Fla. 2nd DCA), cause dismissed, 718 So. 2d 173 (Fla. 1998), the Second District Court of Appeal determined that the **removal** of wheels and tires from a motor vehicle and **subsequent theft** of those items constitutes a *prima facie* case of burglary of a conveyance. By its decision, that Court in effect determined that a conviction for burglary of a conveyance may be affirmed based upon the mere evidence that a defendant broke and entered (in the parlance of common law burglary) with the intention of committing the offense of breaking and entering.
The Second District Court of Appeal subsequently followed its own precedent set forth in Word, supra, in the decision sought to be reviewed. However, in affirming the Petitioner's convictions and sentences below, the Second District Court of Appeal certified conflict between the decision sought to be reviewed and State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979).
Most respectfully, there simply was no "entry" in the instant case. In R.E.S. v. State, 396 So. 2d 1219 (Fla. 1st DCA 1981), the First District Court of Appeal held that the act of siphoning gasoline from an automobile does **not** support a charge or conviction for burglary of a conveyance. While acknowledging the existence of decisional authorities which have affirmed convictions for the burglary of automobiles, the court noted that such cases:
involved the entry into a compartment of a vehicle which can be entered either wholly or partially by a person; e.g., engine and passenger compartments, trunks, etc (citation omitted).

R.E.S. v. State, 396 So. 2d at 1220. The court also quoted from the "analogous" case of Kirkland v. State, 142 Fla. 73, 194 So. 624, 625 (1940), wherein this Court observed that siphoning gasoline from a vehicle gas tank constitutes only a theft, and not a burglary.
Moreover, even if this Court were to conclude that there was an entry in the instant case, there was no evidence whatsoever of Petitioner's intent to commit any offense **within** the conveyance as required by the statute. In State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979), the Fifth District Court of Appeal considered the question whether the theft of automobile hubcaps constitutes burglary of a conveyance. In affirming the trial court's dismissal of a burglary count, the court aptly observed that the theft of automobile hubcaps wholly fails to establish a *prima facie* case of intent to commit an offense **within** the vehicle from which the hubcaps are removed:
The definition of "entering a conveyance" [to include taking apart any portion of the conveyance] does not obviate the necessity for alleging facts in support of an intent to commit an offense therein.

State v. Hankins, 376 So. 2d at 286.
It would appear that the trial court's reliance upon Greger v. State, 458 So. 2d 858 (Fla. 3rd DCA

1984), in its Order on Motion to Dismiss was misplaced, as Greger is clearly distinguishable from the case *sub judice*. In Greger, supra, the defendant was charged with and convicted of the offenses of burglary of a conveyance (a boat) and second degree grand theft (of a boat motor). In that case, the court rejected arguments made by the defendant: 1) that there was no **entry** with respect to the boat, and 2) that any entry made by the defendant was without **intent** to commit the offense of theft **within** the boat.

With respect to the first element, the court held that the defendant's removal of the boat's cowling, or motor cover, and some of the nuts and bolts which attached an outboard motor to the boat's transom constituted an "entry" into the boat under the burglary statute. "Here the appellant entered the boat when he began loosening bolts from the protruding motor at the stern of the boat." Greger v. State, 458 So. 2d at 860.

With respect to the second element, the court held that, *inter alia*, the defendant's actual physical possession of one of the bolts at the time of his arrest, constituted *prima facie* evidence of the defendant's intent to commit the **separate** offense of theft of the boat motor (as opposed to, by analogy to the instant case, theft of the bolt itself). Significantly, in apparent agreement with Hankins, supra, the court held that "…the definition of 'entering a conveyance' does not obviate the necessity for alleging facts in support of an intent to commit an offense **within** the conveyance." Id. (emphasis supplied). The defendant's removal of certain parts of the boat (entry) facilitated the commission of (and constituted evidence of the defendant's intention to commit) the **separate** offense of theft of the boat motor.

Succinctly stated, the court deemed the defendant's removal of certain parts of the boat satisfied both the entry and intent elements of the burglary statute. However, the intent involved was to commit a theft of something **other than** that which was removed in order to effectuate the entry and facilitate the commission of the theft of a separate object.

Although not specifically addressed in the Greger decision, theft of the bolt following its removal would have been wholly inadequate under the rationale adopted in Hankins, supra, to establish a *prima facie* case of intent to commit **theft of the bolt *within* the boat**. By analogy, theft of the tires and rims in the instant case following their removal from the vehicle should have been wholly inadequate to survive a motion to dismiss a charge of entering a conveyance to commit a theft of the tires and rims **within** the vehicle.

Any other interpretation of the subject statute leads to the absurd result that burglary of a conveyance occurs every time a gas cap, an antenna or a hood ornament is removed from an automobile. Such minor offenses, while certainly criminal in nature, are no more deserving of the enhanced penalty that a felony conviction for burglary provides than is the petit theft of a mailbox or window shutter from a dwelling. *See* Griffin v. State, 815 S.W. 2d 576 (Tex.Cr.App.1991).

Both Greger and R.E.S. acknowledge and appear to be in harmony with the holding in State v. Hankins. Only the decisions of the Second District Court of Appeal in Word, supra, and in the instant case appear to be in conflict:

Appellee's theft of the wheels and tires removed from the automobile supply sufficient evidence of his intent to commit an offense after entering the automobile by taking apart or removing the wheels and tires. To the extent that State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979) can be read to hold to the contrary, we are in conflict.

State v. Word, 711 So. 2d at 1241.

The removal of tires, rims and lug nuts from an automobile manifests nothing more or less than an intention to steal those tires, rims and lug nuts in precisely the same way that the removal of automobile hubcaps manifests an intention to steal the hubcaps so removed. In the latter instance, no one could convincingly argue that the removal of automobile hubcaps constitutes an "entry" into the vehicle and at the same time manifests an intention on the part of the hubcap thief to steal hubcaps from "within" the vehicle once inside the vehicle as a result of the hubcaps having been so removed. See State v. Hankins, 376 So. 2d 285, 286 (Fla. 5th DCA 1979)(definition of entering a conveyance does not obviate the necessity of establishing separate element of intent to commit an offense "therein").

The exercise of logic and fairness dictates that the crime of theft of automobile hubcaps is complete with the removal of the objects sought to be taken. One does not "intend" to commit an offense which has already been committed. When the intent element is established by the very same evidence relied upon to establish the element of "entry," the following legal redundancy results:
he entered the vehicle by removing the widget, with the intent of committing the offense of removing the widget once inside the vehicle (as a result of having entered the vehicle by removing the widget).

Slightly restated, the nonsensical hypothetical becomes:
he entered the vehicle by stealing the widget, with the intent of stealing the widget once inside the vehicle (as a result of having entered the vehicle by stealing the widget).

Nevertheless, as a result of a tortured interpretation of the burglary statute in the instant case (involving the establishment of two elements of the offense charged, entry as well as intent, by evidence of a single act, a taking), the former conduct has been unjustifiably enhanced from a misdemeanor (petit theft) to a felony (burglary of a conveyance). The absurd and unjust results which are invited by such an interpretation of the burglary statute are explored in detail in the dissenting opinion in Zipperer v. State, 481 So. 2d 991 (Fla. 5th DCA 1986). Moreover, it should be noted that at least two decisional authorities have interpreted the intent element to require proof of an intent to commit a **felony** therein. See Zipperer v. State, supra; Braswell v. State, 671 So. 2d 228, 229 (Fla. 1st DCA 1996)(crime of burglary of a conveyance requires "proof of entry into the vehicle with intent to commit a felony").
As the Second District Court of Appeal itself observed in Porter v. State, 341 So. 2d 1017, 1019 (Fla. 2d DCA), cert. denied, 352 So. 2d 174 (Fla. 1977), and as quoted in State v. Hankins, 376 So. 2d 285, 286 (Fla. 5th DCA 1979):
The state must prove intent to commit a felony, and in the absence of other evidence or circumstances bearing on the defendant's intent, the best evidence of that intent is what he did steal (citation and footnote omitted).

In the instant case, Petitioner was charged with and convicted of petit theft (Count II), a misdemeanor offense commensurate with the severity of the wrongdoing. Petitioner's clear intention in the instant case was to commit a petit theft, not a burglary.
The instant case presents a clear example of prosecutorial overcharging. Inasmuch as Petitioner's motion to dismiss the burglary charge should have been granted, it necessarily follows that the motion to dismiss the possession of burglary tools charge also should have been granted. Alternatively, in the event that this Court should determine that the issue regarding the Petitioner's intent was properly presented to the trier of fact, Petitioner's motion for judgment of acquittal and/or renewed motion for judgment of acquittal should have been granted as to Counts I and III, inasmuch as the evidence is legally insufficient to sustain the jury verdicts of guilt as to those counts.

CONCLUSION

Based upon the arguments presented and the authorities cited herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction to disapprove the decision of the lower court sought to be reviewed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Petitioner has been furnished by U.S. mail delivery to: Terrell Curtis Drew, 649 Eagan Road, Hinesville, Georgia 31313; James Marion Moorman, Public

Defender, Tenth Judicial Circuit, P.O. Box 9000-Drawer PD, Bartow, FL 33831; and Assistant Attorney General John T. Salgado, Office of the Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607 this _____ day of July, 1999.

Respectfully submitted,

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