Supreme Court of Florida

THURSDAY, JUNE 12, 2003

CASE NO.: SC95824
Lower Tribunal No.: 98-1315CF-52

MAURICE LAMAR FLOYD vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's and appellee's motions for rehearing or clarification are denied.

ANSTEAD, C.J., WELLS, PARIENTE, LEWIS, and QUINCE, JJ., and SHAW, Senior Justice, concur.
WELLS, J., concurs with an opinion, in which ANSTEAD, C.J., and SHAW, Senior Justice, concur.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jb
Served:

Hon. Tim Smith, Clerk
Hon. William A. Parsons, Judge
Christopher S. Quarles
Kenneth S. Nunnelley
Douglas T. Squire

WELLS, J., concurring.

I believe that the majority opinion errs in determining that the trial court committed fundamental error by giving the jury instruction for burglary that included language relating to the "remaining in" portion of the burglary statute. See § 810.02(1), Fla. Stat. (1997).

The decision in Delgado v. State, 776 So. 2d 233, 240-42 (Fla. 2000), is not applicable to the present case because the present case does not support the affirmative defense of consensual entry. Because consensual entry was not established, the fact that the jury instruction given in this case referred to the "remaining in" language is irrelevant. In Delgado, "[t]he State prosecuted this case on the premise that [Delgado's] entry into the victims' home was consensual (i.e., [Delgado] was invited to enter the victims' home) but that at some point, this consent was withdrawn." Id. at 236. This Court stated:

> [C]onsensual entry is an affirmative defense to the charge of burglary, and therefore the burden is on the defendant to establish that there was consent to enter. Evidence presented by the State can also establish a defendant's affirmative defense. In the present case, there exists sufficient evidence in the record that [Delgado] met his burden of establishing consensual entry.[n.]
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> [n.] In addition to the testimony from the police

> that there were no signs of a forced entry, a review of the record reveals that the State made numerous remarks throughout the trial which indicate that its theory was withdrawn consent after entry: "A burglary requires a remaining in after such time as consent has been withdrawn . . . . Someone comes to your house initially, you let them in, and they become loud or boisterous . . . and you just don't want them there anymore," "Tomas Rodriquez did not hate or have any problems with Jesus Delgado, after all he let him in," and "Burglary was established at the time the defendant chose to remain in that house against the will of Violetta and Tomas Rodriguez."

Id. at 240 (citations omitted) (emphasis added). The Delgado majority concluded that burglary was not justified in consensual entry cases unless the defendant remained in the dwelling "surreptitiously." Id. at 240.

After Delgado became final, this Court affirmed a burglary conviction in Francis v. State, 808 So. 2d 110 (Fla. 2001), where the burglary instruction given was substantially similar to the one given in the present case.[1] This Court stated:

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1. In Francis's case, the trial court instructed the jury as follows:

> [B]efore you could find the Defendant guilty of Burglary, the State must prove the elements beyond a reasonable doubt:
>
> That Carlton Francis entered a structure owned by or in the possession of [the victims].
>
> That Carlton Francis did not have the permission or consent of [the victims] or anyone authorized to act for them, to enter or remain in the structure at the time.
>
> At the time of entering or remaining in the structure, Carlton

> In Delgado, we held that burglary is not intended to cover a situation where an invited guest turns criminal or violent once he peaceably gains entry. Delgado, however, reiterates the well-settled rule that the burden is on the defendant to establish consent. In this case, the defendant at no point argued, or even suggested, that the victims invited him into the home. It is important to note that the absence of evidence of forced entry and the presence of evidence indicating that a defendant is known to the victims does not necessarily translate into entry by consent as a matter of law. There are a host of non-consensual scenarios, including: the defendant entered, without an invitation, through an unlocked door; the defendant used the key that the victims kept hidden; or the defendant pushed his way into the house after the victims opened the door in response to his knock.

Id. at 133-34 (citations omitted). Although the jury instruction given in Francis included language relating to the "remaining in" portion of the burglary statute, this Court affirmed the burglary conviction because the defendant had not established that there was consensual entry, and therefore Delgado was not applicable. See id. at 134.

After Francis, this Court again affirmed a defendant's burglary conviction despite the fact that the jury instruction included the "remaining in" language. Woodel v. State, 804 So. 2d 316, 322 (Fla. 2001).[2] In Woodel, this Court stated

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> Francis had a fully-formed, conscious intent to commit the offense of theft in that structure.

2. In Woodel's case, the trial court instructed the jury as follows:

> Before you can find the Defendant guilty of Burglary, the State must prove the following three elements beyond a reasonable doubt:

that "Woodel specifically states in his confession that he did not have permission to be in the trailer and that he intended to hit" the victim. Id. Because Woodel had not raised and established the affirmative defense of consensual entry, Delgado was not an issue in that case. During oral argument before this Court, Woodel's appellate counsel indicated that Delgado was not implicated in this case because there was no consensual entry. The fact that the jury instruction given in Woodel mentioned the "remaining in" language did not render Woodel's burglary conviction invalid.

Thus, I conclude that this Court's decision in Delgado is only applicable when the defendant establishes the affirmative defense of consensual entry or when the State concedes that there was a consensual entry. See also Mosley v. State, 842 So. 2d 855, 857 (Fla. 1st DCA 2002); Johnekins v. State, 823 So. 2d 253, 259 (Fla. 3d DCA 2002). Neither occurred in the present case. Floyd in no way

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1. The Defendant entered or remained in a structure owned by or in the possession of [the victims].
2. The Defendant did not have the permission or consent of [the victims], or anyone authorized to act for them to enter or remain in the structure at the time.
3. At the time of entering or remaining in the structure, the Defendant had a fully-formed, conscious intent to commit theft or assault in that structure.

affirmatively established that he entered the victim's residence consensually. In fact, at no time did Floyd's counsel argue to the jury that Floyd entered the victim's residence consensually. Floyd's counsel argued that although Floyd had been seen confronting the victim, someone else committed the murder. Because Floyd has failed to carry his burden in establishing that the entry into the victim's dwelling was consensual, Delgado is not applicable to this case and Floyd's burglary conviction should be affirmed. See Woodel, 804 So. 2d at 322; Francis, 808 So. 2d at 133.

The majority erroneously overextends the Fifth District's decision in Valentine v. State, 774 So. 2d 934 (Fla. 2001). A reading of Valentine shows that, in respect to the "remaining in" language in the burglary instruction, the Fifth District's opinion does not mention fundamental error. Fundamental error is only mentioned in respect to that portion of the burglary instruction which stated that "Valentine had to enter the vehicle with the intent to commit a 'burglary' rather than with intent to commit some distinct, underlying offense." Id. at 936. That issue was conceded by the State. The holding of the Fifth District in respect to the Delgado issue was:

> However, because this is not a case where the facts could support a "surreptitious remaining," Valentine could not be convicted of burglary unless he had the requisite intent when he entered the vehicle.

> Accord Bledsoe v. State, 764 So. 2d 927 (Fla. 2d DCA 2000) (defendant could not be convicted of burglary for remaining at party after hostess asked him to leave). In light of these errors in the instructions, Valentine is entitled to a new trial.

Valentine, 774 So. 2d at 937 (emphasis added). It must also be noted that the Fifth District in Valentine did not hold that the instruction was erroneous. The Fifth District held that the instruction was incomplete. Finally, Bledsoe v. State, 764 So. 2d 927 (Fla. 2d DCA 2000), which Valentine cites from the Second District, is a case which fits within Delgado since in that case, as in Delgado, the facts were that the defendant was invited into the home.

The statement in the majority is erroneous factually because the record does not support a "consensual entry." The majority points to no record facts in support of this statement. More importantly, the record without question does not support any contention that the defendant met the burden of establishing consensual entry as an "affirmative defense," which as earlier pointed out is precisely what Delgado states is required. The majority ignores its own recitation of the facts in which the salient evidence was that the victim, Mrs. Goss, knew before Floyd arrived at her porch of the present and ongoing threat to her daughter because Mrs. Goss's daughter had called and "told [Mrs. Goss] what was going on." In response to learning of these threats, Mrs. Goss stated that the

grandchildren were with her and that "I won't let him get my grandchildren."

Furthermore, when Mrs. Goss's body was found, the victim was not wearing any undergarments. In footnote 6 of the opinion issued August 22, 2002, the majority states: "Ms. Goss's husband, Clifford Goss, testified that his wife never received guests in her home unless she was fully dressed. He said that she would never have company inside her home if she was not wearing undergarments." Majority op. at 6 n.6. Thus, contrary to the majority's conclusion that "there is evidence of a consensual entry," the record supports that there was no consensual entry as was found by the trial court in its sentencing order:

> In the verdict returned in this case the jury found the defendant was guilty of first degree murder as well as armed burglary of Mrs. Goss' dwelling which is part of the transaction that led to her death. There is no question that Mr. Floyd came to the Goss residence with an evil intent. He entered the premises by force causing damage to a door frame in the process of entry and awakened Mrs. Goss who had disrobed and was sleeping in her nightwear. A verbal confrontation occurred on the premises between Mr. Floyd and Mrs. Goss during which she did what she could to usher her three young grandchildren out of her home and across the street to the safety of the neighbors's residence. With that safely accomplished she attempted to flee the house with Mr. Floyd in pursuit.

State v. Floyd, No. 98-1315-CF at 3 (Fla. 7th Cir. Ct. order filed May 26, 1999) (emphasis added).

The fact that the instruction given in the present case included the statutory

"remaining in" language should not render Floyd's burglary conviction per se invalid. Plainly and simply, there was no issue in Floyd's case about the meaning or applicability of the burglary statute, as there was in Delgado where there was without question consensual entry. From a reading of Delgado, it is obvious that Delgado was not intended to reverse all nonfinal burglary convictions based on fundamental error simply because the instruction followed the then-existing law and used the words "remaining in," without the word "surreptitiously." The majority's holding that fundamental error occurred in this case unnecessarily expands Delgado beyond its intended scope. Additionally, it is illogical and unreasonable to conclude that the trial court in this case fundamentally erred by instructing the jury based on the express terms of the burglary statute and on this Court's then-existing precedent. When Floyd's counsel was asked about the instruction by the trial judge, counsel not only did not object to the given instruction, counsel affirmatively stated "no objection."

In essence, what occurred with this instruction was that the instruction given was not wrong, but as the Fifth District said in Valentine, 774 So. 2d at 937, the instruction was "incomplete in light of Delgado." This means that, at worst, the instruction would be "vague" under the Delgado interpretation of the burglary statute. It would be vague because it did not state that "remaining in" meant

"surreptitiously remaining in." In this regard, it would be similar to what this Court determined concerning the cold, calculated, and premeditated (CCP) instruction in Jackson v. State, 648 So. 2d 85 (Fla. 1994).

In Jackson, this Court found the CCP instruction to be unconstitutionally vague but did not find that this was fundamental error. To the contrary, this Court held:

> Claims that the instruction on the [CCP] aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal. James v. State, 615 So. 2d 668, 669 & n.3 (Fla. 1993). However, Jackson objected to the form of the instruction at trial, asked for an expanded instruction which essentially mirrored this Court's case law explanations of the terms, and raised the constitutionality of the instruction in this appeal as well. Thus, the issue has been properly preserved for review.
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> As the Supreme Court explained in Sochor v. Florida, 504 U.S. 527 (1992), while a jury is likely to disregard an aggravating factor upon which it has been properly instructed but which is unsupported by the evidence, the jury is "unlikely to disregard a theory flawed in law." See also Griffin v. United States, 502 U.S. 46, 59 (1991) ("When jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.").

Jackson v. State, 648 So. 2d at 90 (emphasis added). It is seen that in Jackson this Court also held that it was necessary to preserve an objection to an instruction in order to get the benefit of the rule of Griffin v. United States, 502 U.S. 46 (1991). See also Pope v. State, 702 So. 2d 221, 223 (Fla. 1997); Walls v. State, 641 So. 2d

381, 387 (Fla. 1994). Applying the same reasoning as set out in Pope to these cases, if the defendant's contention at the trial was that the instruction on burglary should have the "remaining in" part of the instruction explained in more detail, the defendant must have objected and "must attack the instruction itself, either by submitting a limiting instruction or by making an objection to the instruction as worded." Pope, 702 So. 2d at 223-24.

In sum, Delgado should not be extended to cases, such as the present one, in which the defendant did not establish that entry was consensual and the evidence supports a nonconsensual entry with intent to commit an offense. See Woodel, 804 So. 2d at 322; Francis, 808 So. 2d at 133. The majority errs by further extending Delgado to these situations based on a broad application of fundamental error.

ANSTEAD, C.J., and SHAW, Senior Justice, concur.