IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC00-21
	)	
ADAM JONES,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Adam Jones, was the Appellant in the district court and the defendant in the trial court. Petitioner, the State of Florida, was the Appellee and the prosecution. All parties will be referred to as they appear before this Court.

References to the record:

"T" will refer to transcripts

"R" will refer to record

"A" will refer to attached Appendix.

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In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, counsel for Respondent certifies that this brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Respondent adds the following clarifications to Petitioner's statement of the case and facts:

Deputy Robert Macauley, an off-duty corrections officer was walking around the used car lot at midnight, when he noticed Respondent bent over, removing lug nuts off a car on the lot. T 131-132. Respondent saw the officer, stood up with a lug nut wrench in his hand and said, "Oops." T 133. Respondent dropped the lug nut wrench. T 140.

Officer Macauley asked Respondent what he was doing and Respondent replied he was borrowing lug nuts to replace lug nuts someone had stolen off his car. T 142.

Respondent removed the hubcaps and lug nuts of each wheel, but had kept the tires on the car with one lug nut remaining on each wheel. T 149. Officer Macauley testified, ". . . there was one lug nut left on each rim in order . . . to keep it from the wheels falling off . . . ." T 149.

At the time of the incident no portion of the car was held up on bricks. T 149. Neither the car nor the parking lot were secured after Respondent was taken into custody. T 153. (Joyce Chirichello, the lot owner, testified about what she saw the following morning. T 116).

The hood, trunk, and interior of the car were locked and there was no evidence of any entry into those areas. T 122-123; 154.

The hubcaps were introduced into evidence, but the lug nuts were not. T 148; 151.

The trial court cautioned defense counsel during cross-examination of Macauley:

> THE COURT: . . . What I'm concerned about is under the rules an entry into the automobile includes taking apart the automobile. And so if it is an entry within the automobile, arguably, removing of a hub ca[p] is removing the automobile.

T 156.

The trial court denied Respondent's motions for acquittal, holding:

> THE COURT: . . . Once the defendant removed the lug nuts, the burglary was complete. Actually, once he intended to remove the lug nuts. As soon as he took off the hub caps, the burglary was completed.

T 173.

Reversing Respondent's seven-year sentence and conviction for burglary of a conveyance, the Fourth District Court of Appeal held:

> . . . the removal of a wheel, tire, hub cap, or lug nuts, or any combination of the above, from the outside of a conveyance, cannot constitute burglary. Under those circumstances there is no "intent to commit an offense therein," i.e., within the vehicle.

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SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal correctly held that mere removal of lug nuts and hub caps from outside a locked car cannot constitute an entry of the vehicle with an intent to commit an offense therein sufficient to sustain a conviction for burglary where there is no evidence of an attempt to enter the car.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT TAKING LUG NUTS AND HUB CAPS FROM OUTSIDE A LOCKED VEHICLE CANNOT CONSTITUTE ENTRY INTO THE VEHICLE WITH AN INTENT TO COMMIT AN OFFENSE THEREIN TO SUSTAIN A BURGLARY CONVICTION WHERE THERE IS NO EVIDENCE OF AN ATTEMPT TO ENTER THE VEHICLE.

The Fourth District Court of Appeal correctly held that:

> . . . the removal of a wheel, tire, hub cap, or lug nuts, or any combination of the above, from the outside of a conveyance, c a n n o t constitute burglary. Under those circumstances there is no "intent to commit an offense therein," i.e., within the vehicle.

A 2. In reversing Respondent's seven year sentence and conviction for taking hubcaps and lug nuts, the Fourth District aligned itself with the logic of this Court in *Von Edwards v. State*, 377 So. 2d 684 (Fla. 1979) and with *State v. Hankins*, 376 So. 2d 285 (Fla. 5th DCA 1979) and *State v. Dalby*, 361 So.2d 215 (Fla. 2d DCA 1978). A 2. The district court certified conflict with *State v. Word*, 711 So. 2d 1240 (Fla. 2d DCA 1998). A 2.

In *Von Edwards* this Court rejected a defendant's argument that the definition of entry as "taking apart any portion of the conveyance" made the burglary statute unconstitutionally vague. This Court cited *State v. Dalby*, 361 So. 2d 684 (Fla. 2d DCA 1978) and held that "the legislative intent is that the removal of a portion of the conveyance must be to facilitate the commission of

an offense **within** the conveyance." *Von Edwards*, 377 So. 2d at 685 (emphasis added).

Section 810.02(1), Florida Statutes (1997), defines burglary as "entering or remaining in a structure or a conveyance **with the intent to commit an offense therein**." F.S. 810.02(1) (1997). In order to prove the burglary, the state must prove a non-consensual entry with intent to commit an offense therein. *State v. Hankins*, 376 So. 2d 285 (Fla. 5th DCA 1979). The entry must be made by some part of the body or an instrument used not only for the breaking but for the purpose of committing the felony. *Foster v. State*, 220 So. 2d 406 (Fla. 3d DCA), *cert. denied*, 225 So. 2d 913 (Fla. 1969). *See also State v. Spearman*, 366 So. 2d 775 (Fla. 2d DCA 1978); *Stanley v. State*, 626 So. 2d 1004 (Fla. 2d DCA 1993).

In *State v. Hankins*, 376 So. 2d 285 (Fla. 5th DCA 1979), the Fifth District determined that stealing hubcaps did not establish burglary of a conveyance because there was no entry of a vehicle or conveyance. The *Hankins* court ruled that the state must prove not only an entry, but also the defendant's intent to commit an offense **within** the vehicle to establish a prima facie case for burglary.

In *State v. Dalby*, 361 So.2d 215 (Fla. 2d DCA 1978), the Second District stated that ". . . the word "therein' requires that the offense must be capable of being committed **within** the vehicle"

Dalby, supra (emphasis added). In the instant case, as correctly held by the Fourth District Court of Appeal the theft of the hubcaps and lug nuts from an automobile wholly fails to establish a prima facie case of intent "to commit an offense therein."

"The gravamen of the offense of burglary, whether of a conveyance or otherwise, is a nonconsensual entry with the intent to commit an offense within; the purpose of the statute is to punish an invasion of the possessory property rights of another in structures and conveyances." *Hankins*, 376 So. 2d at 286 (citing *Presley v. State*, 61 Fla. 46, 48, 54 So. 367, 368 (1911); *Holzapfel v. State*, 120 So.2d 195, 197 (Fla. 3rd DCA 1960) (*cert. denied, State v. Holzapfel*, 125 So.2d 877 (Fla.1960)); *Vazquez v. State*, 350 So.2d 1094 (Fla. 3rd DCA 1977) (*cert. denied, State v. Vazquez*, 360 So.2d 1250 (Fla.1978)). As noted by the *Hankins* court, "[t]he definition of 'entering a conveyance' in Section 810.011(2) does not obviate the necessity for alleging facts in support of an intent to commit an offense therein." *Hankins, supra*; *c.f. Dalby, supra.*

The logic and result of the *Hankins* and *Dalby* decisions have also been explicitly approved of by this Court in *State v. Stephens*, 601 So. 2d 1195 (Fla. 1992). In *Stephens* this Court noted "...[t]he *Hankins* court was addressing whether a burglary of a conveyance occurs simply by stealing a vehicle's hubcaps.

Obviously, there was no 'entering or remaining in' the conveyance in that instance." *Stephens*, 601 So. 2d at 1196. The *Stephens* court also went on to further state that it expressly approved the opinion in *State v. Dalby*, 361 So. 2d 215 (Fla. 2d DCA 1978).

Other decisions by district courts have required some entry by a body part of the defendant to withstand a burglary conviction. In *Anderson v. State*, 415 So.2d 829 (Fla. 3d DCA 1982), the Third District held that lifting a radiator from an engine compartment of a vehicle lacking a hood did constitute burglary of a conveyance because defendant entered under the hood of the vehicle with a portion of his body. *See also R.E.S. v. State*, 396 So. 2d 1219 (Fla. 1st DCA 1981) (siphoning gasoline from an automobile did not constitute burglary of a conveyance because there was no entry); *State v. Harvey*, 403 So.2d 630 (Fla. 2d DCA 1981) (taking a starter by entering the engine compartment through the underside of the car a burglary because the defendant necessarily entered the engine compartment); *Bragg v. State*, 371 So.2d 1082 (Fla. 4th DCA 1979) (opening hood of a car and entering part of body to remove a battery constituted entry). In *Braswell v. State*, 671 So. 2d 226 (Fla. 1st DCA 1996) the First District analyzed whether burglary of a conveyance had been committed by focusing on whether the appellant had entered the conveyance with any part of his body. Braswell stole a cooler tied down with bungee cords from the bed of

a pickup truck. The *Braswell* court found the entry and intent to enter requirements met, finding that entry of a portion of a defendant's body into a conveyance sufficient proof of burglary. The *Braswell* court opined, "[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 than taking a hubcap from a tire's exterior or siphoning gas from a gas tank, neither of which involves entry by any part of one's body into a vehicle." *Braswell*, 671 So. 2d at 229.

In *Greger v. State*, 458 So. 2d 858 (Fla. 3d DCA 1984) the Third extended the entry requirement to find an entry into a boat when the appellant began loosening bolts from the motor at the stern of the boat. The Third District agreed in *Greger* 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. However in *Greger* the Third decided that since the conveyance is defined as the entire boat, including its attached engine, the question of appellant's intent to steal was one to be determined by the trier of fact and found that the jury could reasonably conclude that the appellant entered the boat for the purpose of committing theft when he loosened the bolts to

the engine itself.

Because the officer specifically testified that Appellant left the tires on the vehicle with one lug nut remaining on each tire, this case is actually factually distinguishable from *State v. Word*, 711 So. 2d 1240 (Fla. 2d DCA 1998). In *Word* the Second District held that by removing the wheels and tires of an automobile the appellant entered the vehicle. The *Word* court opined, "[i]t is clear from a plain reading of the language of the statute that by removing the wheels and tires of the automobile, appellee entered the vehicle by taking apart a portion of the conveyance. The *Word* court went on to infer an intent to enter the vehicle with intent to commit an offense therein from removing the tires and wheels. As noted by the Fourth District in its decision in this cause, the Word court never addressed its earlier decision in *Dalby*. A 2. The Second District in *Word* did acknowledge conflict with *State v. Hankins*, 376 So. 2d 285 (Fla. 5th DCA 1979), the more logically consistent approach which the Fourth District Court's decision follows, and Respondent urges this Court affirm.

CONCLUSION

WHEREFORE, based upon the foregoing, Respondent Adam Jones, respectfully requests this Court affirm the Fourth District Court of Appeal's decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to James J. Carney, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Street, West Palm Beach, Florida 33401 by courier this sixth day of March,2000.

Attorney for Adam Jones