IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-21

ADAM JONES,

Respondent,

vs.

STATE OF FLORIDA,

Petitioner.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Petitioner herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Respondent was the defendant in the trial court and District Court below and will be referred to herein as “Respondent” and “Defendant”. Petitioner, the State of Florida, was the prosecution in the trial court below and will be referred to herein as “Petitioner” or “the State”. Reference to the record on appeal will be by the symbol “R”, reference to the transcripts will be by the symbol “V”, followed by the volume number reference to any supplemental record or transcripts will be by the symbols “SR[vol.]” or ST[vol.].”

STATEMENT OF THE CASE AND FACTS

Having stopped at the Easy Motor Credit used car lot near midnight on his way home from work, Deputy Robert Macauley ("Macauley") testified he observed the Defendant "doing something" to one of the vehicles on the lot. (V2 127-131). Petitioner "appeared to be removing the lug nuts from the left rear of the vehicle" using a crowbar type tool. (V2 132 and 140). Upon becoming aware of the deputy's presence, Respondent said "Oops", dropped his crow bar, "turned around on his own", and "placed his hands behind his back." (V2 133 and 141). Macauley identified State's Exhibit B for identification (Exhibit 1) as the crowbar he believed was used by the Defendant that evening. (V2 133-139).

Seconds after Macauley confronted the Defendant, a Lauderhill police officer arrived. (V2 140-141). Both officers then collected the hubcaps, lug nuts, and crowbar. (V2 140-141). When Respondent was discovered, the hubcaps were in a white plastic bag. (V2 143). Macauley made a positive identification of the hubcaps and they were admitted into evidence. (V2 144-148). It was Macauley's recollection the each tire rim required five lug nuts; the Defendant had removed most of the lug nuts, leaving only one on each tire. (V2 149).

Joyce Chirichello ("Chirichello") testified she owned Easy

Credit Wholesale Motors, located in Broward County, Florida. (V2 113-114). Arriving to work on February 8, 1997, Chirichello noticed that the lug nuts, front tires, and hubcaps had been removed from her Chrysler New Yorker and a brick or block was under one tire. (V2 116-117, 118-19, 122). The automobile's hood, trunk, doors, and windows were locked and closed. (V2 122-123). A few lug nuts were near the vehicle. (V2 124). Chirichello explained that she had never seen the Defendant at her business. Neither she nor her employees had given Respondent permission to be on her property (V2 118). The automobile had all its tires at 9:00 p.m. the previous evening when it was driven to block the driveway of the business. (V2 125).

At the close of the State's case, defense counsel moved for a directed verdict of acquittal relying upon State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979), for the proposition that a prima facie case for burglary had not been established. (V2 164). Considering both Hankins, and Bragg v. State, 371 So. 2d 1082 (Fla. 4th DCA 1979), the trial court reasoned:

> Here's what the Court sees as the potential weakness in the argument [sic] is the term, "with an attempt to commit the offense therein." We then look to what does the definition of "therein" mean? Does it mean in the passenger compartment? The answer is, no, that it doesn't. Is it in the hood of the car is sufficient [sic].

> If one has to remove part of the car to get to another part, that's burglary. To get to the lug nuts, he has to remove the hubcaps. The lug nuts are within. Within the compartment in enclosed by the hubcaps. He needs to remove the hubcaps to get the lug nuts. The removal of the lug nuts is therein.
>
> …
>
> Here's what I'm seeing because I'm not sure that I agree with [sic]. The last paragraph of the case that you cite [Hankins], the facts of this case are distinguishable in Bragg versus State out of the Fourth District. In Bragg, the defendant opened the hood of the car and removing [sic] the battery. And they held it to be entering. Well, in this case the defendant removed a hub cap to get to the lug nuts.
>
> I don't see the distinction between opening the hood and removing the battery or removing a hub to get the lug nuts. It is the same thing. He is having to remove a portion of the automobile to commit an offense in an enclosed space in the automobile. The lug nuts are in an enclosed space of the automobile therein.

(V2 166-167). Distinguishing Hankins, the trial judge opined:

> Stop. Let me just explain what I'm saying. First, the confusing aspect that I'm seeing is that in the Hankins case says [sic], the Court say[s] that there is no problem with the entry. There is an entry. The problem is, [sic] is the intent to commit the offense therein is missing.
>
> What the Supreme Court says when it looks at Hankins - the Supreme Court is saying that in Hankins there was obviously no entry. Well, under the standard jury instructions [sic]

> means taking apart any portion of the automobile. There is clearly an entry. The District Court in Hankins did find that there was an entry. They didn't have any problem with entry. What they had a problem with is intent to commit an offense therein. The language of "an intent to commit an offense therein" is the problem.
>
> In this case because it seems to me that the case is on all fours is the case out of the Fourth District Court of Appeals which is [Bragg] at, 371 So. 2d 1082, out of the Fourth District in 1989. Is [sic] what that says is that in that case - if the hood is open to steal the battery. If there is an opening, essentially of any enclosed part of the automobile to get something that is covered, that's a burglary.
>
> But that appears to be taking the evidence, in the light most favorable to the State, exactly what the State has established is the removal of hubcaps to expose the enclosed therein lug nuts, and then removal of the lug nuts. Even if the lug nuts [are] not removed, the intent to remove the lug nuts there was his intent. If he hadn't removed the hubcaps at all, the minute that the hubcaps [are] removed, the burglary is complete because there is an intent to commit an offense therein which is the removal of the lug nut.

(V2 169-170). Subsequently, the trial court denied the motion for judgment of acquittal. (V2 173-174, 175). Respondent was found guilty of both counts.

On appeal, the Fourth District found that Respondent's actions did not constitute a burglary, certifying conflict with State v. Word, 711 So. 2d 1240 (Fla. 2d DCA 1998). Accordingly,

Respondent's convictions for both counts were reversed (see appendix).

SUMMARY OF THE ARGUMENT

The trial court properly concluded that the State had presented a prima facie case for burglary when it was shown Respondent removed the vehicle's hubcaps in order to expose and remove the lug nuts found underneath. Once it was determined the hubcaps and lug nuts were part of the conveyance, it was a question for the jury whether the Defendant entered the automobile with the intent to commit an offense therein.

ARGUMENT

THE FOURTH DISTRICT ERRONEOUSLY RULED THAT REMOVAL OF HUBCAPS AND LUG NUTS FROM THE CAR DID NOT SATISFY THE ELEMENTS OF ENTRY AND INTENT TO COMMIT A CRIME WITHIN A VEHICLE.

The Fourth District found that it was error to conclude the removal of the hubcaps with the intent to take the lug nuts amounted to an entry of a conveyance with the intent to commit an offense therein. The State disagrees.

The unrefuted evidence showed that Macauley came upon Respondent near midnight on the evening of February 7, 1997, as Macauley was walking near a closed used car lot (V2 127-131). Macauley saw that Respondent had a car's hubcaps in a plastic bag and was in the process of removing the lug nuts with a crowbar type tool. (V2 132-133). Upon seeing Macauley, Respondent stood up, dropped the crowbar, said "Oops", then turned around placing his hands behind his back. (V2 133, 141).

Pursuant to Section 810.02(1), Florida Statutes (1997):

> Burglary" means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

Conveyance and entry are defined in section 810.011(3), Florida Statutes (1997) as follows:

> "Conveyance" means any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car; and "**to enter a conveyance**" **includes taking apart any portion of the conveyance**. (emphasis supplied).

Of import in the definition for conveyance is that taking apart any portion of the conveyance constitutes an entry of the conveyance under section 810.011(3). Because the hubcaps are a part of the automobile, removal of them satisfies the entry requirement of section 810.011(3). Unscrewing the lug nuts from the wheels to take the lug nuts or wheels establishes the offense committed within the conveyance. Hence, Respondent committed a burglary.

The thrust of Respondent's argument is based upon his interpretation of State v. Hankins, 376 So. 2d 285 (Fla. 5th DCA 1979). In Hankins, the defendant was convicted of burglary of a conveyance when he took the hubcaps of a vehicle. The question on appeal was "whether or not the simple removal of hubcaps constitutes burglary of a conveyance." Id. at 286. The Fifth District Court of Appeal reasoned that "essential to a *prima facie* case of burglary is the allegation of facts in support of defendant's intent to commit an offense *within* the structure or conveyance." Id. (emphasis in original). The district court found that "the theft of the hubcaps from an automobile wholly fails to

establish a *prima facie* case of intent 'to commit an offense therein', within the meaning of Section 810.02(l), Florida Statutes." Id. (emphasis in original). Concluding, the district court stated, "[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. Id. (citing State v. Dalby, 361 So. 2d 215 (Fla. 2d DCA 1978)). The Fifth District Court reasoned that merely stealing the hubcaps from a vehicle did not amount to a burglary, but that something more had to be shown to establish that the defendant intended to commit an offense therein.

In this case, the State made such a showing. Not only did the State establish that Respondent detached the hubcaps, but that Respondent took the next extra step of removing the lug nuts, which were exposed once the hubcaps were off the vehicle. Such evidence proved Respondent entered the conveyance by taking apart a piece of the vehicle, and he intended to take the lug nuts which were within the vehicle and covered by the hubcaps.

Respondent's reliance upon State v. Dalby, 361 So. 2d 215 (Fla. 2d DCA 1978) is misplaced as is evident from subsequent district court decisions determining what constitutes a burglary of a conveyance. In Dalby, the Second District stated, "While we

agree that the word 'therein' requires that the offense must be capable of being committed within the vehicle …" such does not mean that the defendant must be within the passenger compartment, under the hood, or in the trunk. It appears sufficient that the defendant removes a part of the conveyance and reaches into that area or breaks the plane of the perimeter of the vehicle. Braswell v. State, 671 So. 2d 228, 229-30 (Fla. 1st DCA 1996)(removing cooler from open bed of truck burglary)[1]. Thus, by removing the hubcaps and breaking the plane of the automobile to unscrew the lug nuts, Respondent committed a burglary.

Respondent also relied on State v. Stephens, 601 So. 2d 1195 (Fla. 1992) in the District Court. He maintained that this Court has approved his reading of Hankins and Dalby. However, the sole issue before the court in Stephens was whether a defendant was guilty of burglary when he entered the vehicle for the purpose of taking the vehicle, not committing an offense therein. Thus, Stephens is not dispositive of the instant issue before this Court.

Greger v. State, 458 So. 2d 858 (Fla. 3d DCA 1984) supports the State's position that the removal of hubcaps to expose and

[1]See also Judge Upchurch's dissent in Zipperer v. State, 481 So. 2d 991 (Fla. 5th DCA 1986)(conviction for burglary affirmed on appeal where it was shown defendant had reached into the open bed of a pick up truck to remove a piece of personal property).

remove the lug nuts contained underneath, is a burglary. In Gregar, the officer testified at trial the cowling (the fiberglass cover of the outboard motor) had been removed along with some bolts. Id. at 859. The Third District Court of Appeal concluded, "[b]y the plain meaning of the burglary statute, the appellant entered the boat when he removed a portion of the boat, to-wit, the cowling and the bolts." Id. at 860. Petitioner's removing the hubcaps to take the lug nuts (or wheels)[2] is legally indistinguishable from the removal of the cowling to effectuate the theft of the boat motor. As such, Respondent's conviction should be affirmed.

Similarly, in State v. Word, 711 So. 2d 1240 (Fla. 2d DCA 1998), rev. dismissed, 718 So. 2d 173 (Fla. 1998), the Second District found that removal of the tires and wheels of a vehicle constituted a burglary. In reaching this conclusion, the district court relied upon section 810.011(3), Florida Statutes (1995) which provided "'**to enter a conveyance' includes taking apart any portion of the conveyance....**" Id. at 1241 (emphasis in original).

The fact that the burglary statute has expanded the common law

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[2]The jury could have concluded the purpose of Respondent's endeavored was to take the wheels and that he was thwarted by the officer's timely appearance. Whether the intended theft was of the lug nuts or wheels, the evidence supports a burglary of a conveyance conviction.

notion of burglary does not prevent a conviction when a defendant's conduct falls within the terms of the statute. In Baker v. State, 636 So. 2d 1342 (Fla. 1994), the defendant entered the curtilage of a home, removed a screen, and broke the window with a board. This Court found that the defendant's actions constituted burglary:

> The courts "are obliged to give effect to the language the Legislature has used." Cobb v. Maldonado, 451 So.2d 482, 483 (Fla. 4th DCA 1984). "Courts have then no power to set it aside or evade its operation.... If it has been passed improvidently the responsibility is with the Legislature and not with the courts." Van Pelt, 75 Fla. at 798, 78 So. at 695. The proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal.
>
> * * *
>
> Where the legislature has used particular words to define a term, the courts do not have the authority to redefine it. State v. Graydon, 506 So.2d 393, 395 (Fla.1987). . . ..
>
> Citing to the dissent below, Baker argues that statutes in derogation of the common law should be strictly interpreted so as to displace the common law no farther than is necessary. Baker v. State, 622 So.2d 1333, 1338 (Fla. 1st DCA 1993) (Ervin, J., dissenting) (citing Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362 (Fla.1977)). This argument is fallacious on three counts: first, as discussed above, interpretation is inappropriate in the absence of ambiguity; second, a strict and literal reading of the statute is what led to the result below; and third, the legislature has so thoroughly

modified the burglary statute that the present statute must be said to completely abrogate and supersede the common law crime of burglary.

* * *

If the property involved is a conveyance, the burglar need neither enter nor remain if he takes apart any portion of the conveyance. § 810.011(3), Fla.Stat. (1989). (footnote omitted)(emphasis supplied).

* * *

The power to prohibit and criminalize certain acts is within the province of the legislature, not the courts. The burglary statute is clear and unambiguous, and this Court "may not modify it or shade it out of any consideration of policy or regard for untoward consequences." McDonald v. Roland, 65 So.2d 12, 14 (Fla.1953).

CONCLUSION

Based on the foregoing arguments and the authorities, this Court should reverse the Fourth District's decision.

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 courier, to: Siobhan Helene Shea, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 on February 11, 1999.

JAMES J. CARNEY