IN THE SUPREME COURT OF FLORIDA

LENNARD LAPOINT JENKINS,

Petitioner,

v.

CASE NO.: SC00-310
DCA case no.: 5D99-341

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

In addition to the facts provided by the Petitioner, the State offers the following relevant information (all of which is specifically set out in the majority opinion of the district court):

1. The victim testified that after being hit by the car:

> The car began to accelerate and I was still with my right hand trying to hold the strap (of her purse) that I was clinging to. As the car accelerated, I started to lose ground, and that's when I went down. I fell. I was dragged along the asphalt....

(TR 34). When asked how far she was dragged, the victim responded

> I don't honestly remember how long I was being dragged, but it seemed like forever at the time. But once I felt the actual burning and ripping of my skin, I just gave up.

(TR 36).

2. The majority opinion also noted in response to the defense's argument that the car was simply a conveyance and was not used as a weapon:

> The notion that the evidence at trial does no more than show that the vehicle was used as transportation to and from the site of the purse snatching ignores the victim's description of the events. At the very least, it is a jury question whether the automobile was used as a weapon.

Jenkins v. State, 747 So. 2d 997, 998 (Fla. 5th DCA 1999).

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

The fact that a robbery was committed by the Petitioner in this case is undisputed. The only issue is whether there was sufficient evidence as to the use of the motor vehicle to submit the charged offense to the jury. It is the State's position that the trial court determination to deny the defense's motion for judgment of acquittal should be affirmed by this Court.

ARGUMENT

POINT OF LAW

WHETHER THE AUTOMOBILE IN THIS CASE WAS PROPERLY FOUND TO HAVE BEEN USED AS A WEAPON BY THE JURY. (restated).

The Petitioner's position is that the automobile in this case was not used as a weapon. The State respectfully disagrees.

The first issue the State will address is that of jurisdiction. While this Court has accepted jurisdiction in this case, it is still the position of the State that such was done improvidently. In Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

This Court's jurisdiction should not be invoked for the purpose of seeking a second appellate review. The Petitioner in this case admits that a car can legally be used as a weapon[1] and the issue is

[1] See page six of the Petitioner's Merits Brief where the defense recognized that the car's status as a weapon "...must necessarily depend on what use was made of it."

the dispute of how it was used in this case. Whether the facts support the trial court's denial of the defense's motion for judgment of acquittal and whether the Fifth District Court of Appeal correctly found sufficient evidence to support the trial court are both issues which are not novel and are ones which do not need this Court's review for resolution.

The issue presented to the appellate court by the Petitioner was whether the trial court erred by failing to grant the defense's motion for judgment of acquittal. Consistent with case law from this Court and all the other district courts, the majority's decision found that there was sufficient evidence to support the jury's verdict. The evidence showed that the moving car hit the victim, the car accelerated away when she resisted the robbery, and the car dragged her down and across the asphalt. The moving car hitting her and dragging her increased her fear and her injuries, and the evidence clearly showed that it was used as a weapon to assist the Petitioner in his robbery.

As the Fifth District Court of Appeal specifically noted in its opinion:

> According to Jenkins: 'The central issue on appeal, is whether, **in the specific circumstances of this case**, the car was to be classed as a weapon...'

Jenkins, at 998, (emphasis added).

Lastly, as pointed out in the State's jurisdictional brief, the alleged conflict in this case is with the case of Houck v. State, 652 So. 2d 359 (Fla. 1995); however, Houck was not even

cited by the majority opinion of the Fifth District Court of Appeal.

As to the merits of the issue, the robbery in this case led to a high speed chase, and the two defendants were caught with the victim's purse. (TR 52-53, 64). Numerous people saw the entire robbery, and the defendants at the time of arrest even admitted that they were trying to steal money in order to buy some crack cocaine. (TR 65, 80). The only disputed issue is how the car was used.

It appears clear that a car **can** be used as a deadly weapon. See, Jackson v. State, 662 So. 2d 1369 (Fla. 1st DCA 1995), Solitro v. State, 165 So. 2d 223 (Fla. 2d DCA 1964). In fact, as already pointed out, the Petitioner does not dispute this; instead, the Petitioner's assertion is that while a motor vehicle may be used as a weapon the facts of this case only show that the car was used as a conveyance.

To support this argument, the defense attempts to rely upon the previously cited case of Houck. In Houck, this Court approved the holding of the Fifth District Court of Appeal that the issue of whether a paved surface was a weapon was to be decided by the trial court as a matter of law. See, Houck v. State, 634 So. 2d 180 (Fla. 5th DCA 1994). The analysis of this Court included a review of the definition of weapon as found in the dictionary. This Court noted that a weapon was an "instrument of attack…" or "a means used to … defeat another." Houck, 652 So. 2d at 360. This Court also made reference to pavement as being a "passive object". Id. The

Fifth District Court's opinion referred to pavement as "an immovable structure that is incapable of being personally possessed, handled, or wielded in the manner of a dirk (knife), club or chemical device." Houck, 634 So. 2d at 182.

Obviously, a car is capable of being owned and possessed. Furthermore, it is definitely not a "passive object", and it is quite capable of moving and being used as a means to attack another. An example of how it can be so used can be found by simply reviewing the facts of this case.

The victim in this case testified that the Petitioner's car accelerated into her hip and upon the defense's attempt on cross-examination to downplay the contact with the car as only a "bump" she responded "I wasn't just bumped, I was hit." (TR 33, 48). After the car hit her, the victim continued

> The car began to accelerate and I was still with my right hand trying to hold the strap (of her purse) that I was clinging to. As the car accelerated, I started to lose ground, and that's when I went down. I fell. I was dragged along the asphalt....

(TR 34). When asked how far she was dragged, the victim responded

> I don't honestly remember how long I was being dragged, but it seemed like forever at the time. But once I felt the actual burning and ripping of my skin, I just gave up.

(TR 36). This crime left the victim with a fractured shoulder and permanent scarring which led to numerous physical therapy sessions. (TR 36, 47).

As the Fifth District Court recognized in its opinion in this case these facts "at the very least" created a jury question as to whether the car was used as a weapon. Jenkins, 747 So. 2d at 998. The defense at trial had moved for a judgment of acquittal, the trial court determined that there was sufficient evidence to submit the issue to the jury, and the Fifth District Court of Appeal affirmed.

When moving for a judgment of acquittal (JOA), a defendant admits the facts adduced at trial as well as every conclusion which may be inferred from the evidence which is favorable to the State. State v. Law, 559 So. 2d 187 (Fla. 1989), Lynch v. State, 293 So. 2d 44 (Fla. 1974). The facts of this case show that a car hit the victim, the Petitioner grabbed her pursed, and she was dragged along the asphalt causing permanent injury.

In addition to the argument that this car was not used as a weapon, the defense submits that the Petitioner was not the driver of the vehicle; however, the principal statute states:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

§ 777.011, Fla. Stat. (1997). The purpose of the statute is to make all participants in a crime equally accountable. Harris v. State, 513 So. 2d 169 (Fla. 5th DCA 1987). Also, felons are

generally responsible for the actions of their co-felons. Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994). One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme. Id. (quoting Jacobs v. State, 396 So. 2d 713, 716 (Fla. 1981)). This is so even though the defendant does not physically participate in the act, Id., or know in advance it will be committed, Diaz v. State, 600 So. 2d 529, 530 (Fla. 3d DCA), rev. denied, 613 So. 2d 3 (Fla. 1992). The key is whether the extra criminal act done by the co-felon is in furtherance or prosecution of the initial common criminal design. Hampton v. State, 336 So. 2d 378, 379-380 (Fla. 1st DCA), cert. denied, 339 So. 2d 1169 (Fla. 1976).

The facts at trial showed that the two defendants intended to rob the victim, and the facts also showed that they used the car to facilitate the robbery. Clearly, the claim that the Petitioner himself was not driving should not be a defense.

The Petitioner also contends that it was not the Petitioner's intent to use the car to injure the victim. Although the State must prove intent[2] just as any other element of a crime, a defendant's mental intent is hardly ever subject to direct proof. Instead, the State must establish the defendant's intent (and a jury must reasonably attribute such intent) based on the

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[2] Of course intent to injure is not even an element of robbery. See, §812.13, Fla. Stat. (1997). The possible relevance of intent is to the issue of how the car was used by the defendants: as a weapon or as a conveyance.

surrounding circumstances. Brewer v. State, 413 So. 2d 1217 (Fla. 5th DCA 1982). A trial court should rarely, if ever, grant a motion for judgment of acquittal based on the state's failure to prove mental intent. Id. As previously noted, these defendants intended to rob the victim, and they used the car to carry out their plan.

Another assertion by the Petitioner is that the vehicle did not increase the degree of injury. The Petitioner alleges that he was simply in the car or that it was used as a conveyance - incidental to the robbery. Again, this is a factual issue which was rejected by the jury. The Petitioner did not just use the car to aid his attempted escape after snatching the victim's purse. The car hit the victim, and the car pulled the victim across the pavement. The victim suffered a broken upper arm and other permanent injuries.

The Petitioner submits that the offense and the resulting injuries could have been the same if a defendant had grabbed someone's purse and ran off on foot or rode off on a bicycle. However, such argument would seem to miss the point that in addition to the concern and fear obviously suffered by someone who is hit by a car, the victim in this case was also drug across the parking lot. This dramatically increased the victim's injury. A defendant on foot or on a bike would not be able to drag someone down the road. Remove the power of the motor vehicle in this case from the Petitioner's use, and you remove the victim's injuries. Hit by the car, she fell fracturing her upper arm, and was then

pulled along the pavement by the car.

Clearly, there were sufficient facts so as to submit the issue to the jury. That determination was made by the trial court, and it was affirmed by the Fifth District Court of Appeal.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the judgments and sentences imposed by the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Barbara C. Davis, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of October 2000.

_____
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