IN THE SUPREME COURT OF THE STATE OF FLORIDA

LENNARD L. JENKINS ,	)	
	)	
Petitioner,	)	
	)	Supreme Court Case No. SC 00-310
vs.	)	
	)	
STATE OF FLORIDA,	)	5th DCA Case No. 5D 99-341
	)	
Respondent.	)	
_____	)	

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0410519
112 Orange Ave., Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

In November of 1997, the Petitioner snatched a purse from the possession of a woman pedestrian, Frances Moccia, by reaching out from the window of a passing car and grabbing the strap of the purse (R 41).[1] The car was being driven by the Petitioner's girlfriend, Lynn Haydon (TR 62). It was proceeding slowly past the woman in a parking lot when the defendant grabbed the purse (TR 33). The car nudged the woman's hip as it passed, but the impact did not knock her down and caused no permanent injury to her hip (TR 33, 48). When Ms. Moccia felt the strap

[1] References to the record of documents filed with the Clerk of Court are cited herein as (R); those to the transcript of the trial as (TR); those to the supplement to the trial transcript as (TRS); those to the transcript of the jury selection as (JS); those to the transcript of the hearing on the motion for JOA and new trial as (HT), and those to the transcript of the sentencing hearing as (ST).

of her purse being tugged, she immediately grabbed the bulk of the pocketbook with her left arm to hold it close to her (TR 33). The automobile was moving forward and the purse kept getting tugged ahead. Ms. Moccia had the purse close to her body and was pulling the strap, trying to hold onto the strap at the same time (TR 34). The car began to accelerate and Ms. Moccia was still holding on and clinging to the purse. As the car accelerated, Ms. Moccia started to lose ground and fell down. She was dragged along the asphalt and the strap broke (TR 34). The fall caused contusions to the woman's knees and elbows, and the fracture of a bone in the woman's upper arm (TR 36).

The Petitioner's girlfriend then drove the car off, but it was stopped by the police and the Petitioner was arrested. The State filed an Information charging the Petitioner with one count of principal to armed robbery with a weapon, to wit: a motor vehicle; a second count of principal to aggravated battery by great bodily harm; and a third count of principal to aggravated battery with a deadly weapon, to wit: a motor vehicle (R 50, 51).

Motions for Judgment of Acquittal were made on the ground that the car did not legally qualify as a weapon under the facts of the case and there was no intent to inflict injury (R 82-86, TR 84-100, 129-131). The position taken by the State in opposition to the Petitioner's motions was to argue that the Petitioner had

intentionally used the forward impetus of the car to assist in pulling the victim off her feet during the actual purse snatch itself, thus using the car as a weapon (TR 88-90).

The jury returned verdicts of guilty as charged on all counts. A post-verdict Motion for Judgment of Acquittal and new trial was filed, (R 82-86), and denied after being argued to the court at a post-trial hearing (R 140, MT 1-15)

A sentence of two concurrent 20-year sentences: one for the armed-robbery, and one for the principal to aggravated battery count was imposed on February 3, 1999 (R 38). A Notice of Appeal was filed on February 4, 1999 (R 155), and the case was appealed to the Fifth District Court of Appeal. The sole issue on appeal was whether, as a question of law, the automobile was used as a weapon under the provisions of section 812.13(2)(b), Florida Statues, in order to enhance the robbery to robbery with a weapon.

On December 3, 1999, the Fifth District Court of Appeal affirmed the trial court, finding that the evidence was sufficient for a jury to find that the automobile was used as a weapon because the defendant used the vehicle to bump the victim, then reached through the window and grabbed the victim's purse, thereby yanking the victim to the ground and dragging her along the pavement until she relinquished her hold on the purse. Jenkins v. State, 747 So.2d 997 (Fla. 5th DCA 1999). Judge

Harris dissented with an opinion.

A Motion for Rehearing/Motion for Rehearing En Banc was filed on December 14, 1999, and denied on January 14, 2000. The co-defendant, Haydon, was tried separately, and the jury in that case found the automobile was not used as a weapon. Haydon v. State, 755 So. 2d 785 (Fla. 5th DCA 2000). Judge Harris wrote a special concurring opinion in Haydon.

Petitioner requested that this Honorable Court accept jurisdiction. This Court accepted jurisdiction on July 25, 2000, and set oral argument for January 4, 2001.

SUMMARY OF ARGUMENT

Point 1: Whether the automobile in Petitioner's case was a weapon under Section 812.13(2)(b), Florida Statutes, is a question of law to be determined by the court. There was no evidence the automobile was anything more than incidental to the purse snatching. The automobile was not used for the purpose of injuring or intimidating the victim to give up her purse. In this case, the automobile was not a "weapon" under the robbery statute.

ARGUMENT

THE AUTOMOBILE DRIVEN BY PETITIONER'S CO-DEFENDANT WAS NOT LEGALLY A WEAPON UNDER THE ROBBERY STATUTE.

The defense moved for a Judgment of Acquittal on the ground that the evidence had not shown that the car in which the Petitioner was riding during the purse snatch was a weapon or was used as a weapon (R 82-85, TR 85-86, HT 5-9). The issue of whether the car was properly to be considered as a weapon under the facts of this case is central. If the car was not a weapon, or used as a weapon, the Petitioner cannot legally be held responsible for armed robbery. Section 812.13(b), Florida Statutes, the armed-robbery statute, requires that the defendant carry[2] a weapon in the course of the robbery in order for the standard robbery sanctions to be enhanced to a first-degree felony.

A car is not designed as a weapon, therefore its legal status as a weapon must necessarily depend on what use was made of it. Solitro v. State, 165 So. 2d 223 (Fla. 2d DCA 1964).

Here, the evidence at trial clearly showed that the car was pulled up next to the victim, and the Petitioner reached out the window and snatched her purse. The

[2] "Carry" in this instance can also mean use of a car. Nation v. State, 668 So. 2d 284 (Fla. 1st DCA 1996).

car brushed against the victim's hip in passing, but did not injure the hip, and did not knock the victim down, or even push her far enough away to be out of reach of the Petitioner when he reached out to snatch the purse (TR 33, 34, 48). If the car had been consciously used as a weapon, harm would certainly have ensued from its use at this point. Striking the victim with an automobile is one of the instances in which automobiles, have been legitimately held to be weapons. Nation v. State, 668 So. 2d 284 (Fla. 1st DCA 1996).

In the instant case, the evidence is clear that the Petitioner, who was not even driving the car, did not set out to injure the victim by use of the car. Further, no serious harm involving permanency was attributable to the way in which the car was used, the nudge on the hip not having produced any lasting injury (TR 48). Instead, harm resulted from the victim holding onto her purse, which pulled the woman from her feet and resulted in injuries sustained when she hit the pavement. Rather than to say the car was the weapon involved, one could more accurately say that the pavement was the weapon. The car inflicted no serious or permanent injury. The pavement did.

In Houck v. State, 634 So. 2d 180 (Fla. 5th DCA 1994), the Fifth District Court of Appeal considered a case in which death had ensued from the hitting of the victim's head against pavement, and the State charged the pavement as a weapon.

The defense moved for a Judgment of Acquittal on the ground that the pavement should not be considered a weapon. In concluding that the Judgment of Acquittal should have been granted, the Fifth District Court of Appeal held that letting such an issue go to the jury was error, since the issue of what constituted a weapon was one to be decided by the judge as a matter of law. The district court further held that use of pavement did not constitute use of a weapon for purposes of the enhancement statute because the pavement, as employed in that case, was not a weapon with any meaningful sense of that word. This Court upheld the reasoning of the district court quoting Judge Cobb's opinion as follows:

> Here, the underlying fallacy of the State's argument is that it misconceives the legislative intent underlying the reclassification statute. The obvious legislative intent reflected by Section 775.087 is to provide harsher punishment for, and hopefully deter, those persons who use instruments to inflict death and serious bodily injury upon other persons.

State v. Houck, 652 So. 2d 359 (Fla. 1995) (Quoting the wording of the 5th DCA in Houck v. State, 634 So. 2d 180 (Fla. 5th DCA 1994)).

The Petitioner under the facts in the instant case was not in any sense to be considered as "carrying" an instrument commonly recognized as having the purpose to inflict death and serious bodily injury on other persons. The car was designed as a conveyance, and was being used as one. There is no realistic content in the facts

of this case to suggest that the Petitioner intentionally set out to injure the victim with the car, or even foresaw that such injury would take place. In determining whether an object is a "weapon" under the robbery statute, courts apply an objective test which examines whether the object's nature or manner or use was likely to cause great bodily harm. Williams v. State, 651 So.2d 1242 (Fla. 2d DCA 1995).

In Williams, the court reversed a conviction for robbery with a weapon and remanded for imposition of simple robbery, finding hot coffee was not used in a manner that it could have resulted in death or great bodily harm. This court cited Bates v. State, 561 So. 2d 1341 (Fla. 2d DCA 1990) and D.C. v. State, 567 So.2d 998 (Fla. 1st DCA 1990). In Bates, the court determined that a nut driver was not a deadly weapon because of the manner in which the defendant employed the nut driver. In D.C., the state failed to present evidence that spraying deodorant on a person's body at close range was likely to cause death or great bodily harm even if te person suffered harm and received medical treatment.

Bates and D.C. were cited in a footnote together with five other examples in the case of J.A. v. State, 697 So.2d 969 (Fla. 3d DCA 1997). J.A. was charged with aggravated assault with a deadly weapon. When a teacher asked J.A. to sit down, he picked up a stool and started coming at the teacher after saying "bitch ...

don't start with me". The district court concluded that the evidence was insufficient to show the stool was used as a deadly weapon and reduced the charge to simple assault. See also, Blanco v. State, 679 So.2d 792 (Fla. 3d DCA 1996) (evidence that defendant pressed a soda bottle against cashier's back to simulate a firearm insufficient to sustain armed robbery conviction); Forchion v. State, 214 So.2d 751 (Fla. 3d DCA 1968) (evidence that defendant threw two foot long part of broom handle at victim from a distance of twelve to fifteen feet is insufficient to sustain conviction for aggravated assault); Rogan v. State, 203 So.2d 24 (Fla. 3d DCA 1967) (evidence defendant threw a one-foot diameter flower pot into residence insufficient to classify flower pot as deadly weapon for aggravated assault on person seated five feet from window); Robinson v. State, 547 So. 2d 321 (Fla. 5th DCA 1991),(razor blade which had been charged by the State as a concealed weapon should be taken legally as the common household item it was construed to be, and not construed to be a weapon unless it was used in a threatening manner); Smith v. State, 617 So. 2d 444 (Fla. 5th DCA 1993)(unloaded gun is not a concealed firearm because, being unloaded, it was not readily available for immediate use as required by statute). Being in a car while committing a crime should not convert the crime into an armed-robbery offense simply because the car facilitated the robbery in some way.

In Houck, this court quoted the district court's opinion that:

> The failure of the statute to broadly define the term "weapon" cannot be cured by jury speculation. As Houck contends, the panel opinion would open a veritable "Pandora's Box" and allow a creative prosecutor , in conjunction with the jury, to turn almost any intentional injury into one caused by a weapon. For example, would the ground be transformed into a weapon merely because it was the point of impact for a person pushed from a cliff or high building? Would the water become a weapon if the victim was pushed overboard from an ocean liner?

State v. Houck, 652 So.2d at 360. The end result of the jury being allowed to speculate on whether the car was a weapon was that the jury in Petitioner's case found that it was a weapon and in the driver's case that it was not. Haydon v. State, 755 So. 2d 785 (Fla. 5th DCA 2000). Surely the legislative intent was not to punish more severely a person who had no control over the vehicle. As Judge Harris points out in his dissent, the initial bump by the vehicle did not cause injury. The vehicle was incidental to the purse snatch, and the legislature did not intend an unplanned and unintended act to become an enhancer. As Judge Harris pointed out in his concurring opinion in Haydon, the legislature has enacted a purse snatching statute, Section 812.131, Florida Statutes (1999) for which snatching with a deadly weapon is only a second degree felony. It can hardly be accepted that a car was necessary to complete the crime of robbery in this case. Petitioner could have

achieved the same criminal result by simply grabbing the purse and running off on foot, on bicycle, or roller skates, toppling and injuring the victim in that fashion. In this case, it is clear that the car was not intended to be a weapon, and the facts clearly show that it did not so function. The fair interpretation of the facts is that the car was being used as nothing more that a means of conveyance to carry someone to and from a strong-arm robbery.

In the instant case, the State is asking that an automobile which actually functioned in the crime is nothing more than a means of conveyance should be accepted as a weapon. Petitioner acknowledges Jackson v. State, 662 So.2d 1369 (Fla. 1st DCA 1995), which held that an automobile may be "carried" as a deadly weapon under Section 812.13(2)(a). However, Jackson was decided as a matter of law under the facts of that case which showed the defendant used the automobile to run down the victim, after which the victim's wallet was taken as he lay at the side of the road, seriously injured. Jackson v. State, 662 So.2d at 1371. Further, as Petitioner argued below, this is a question of law for the trial judge. Jackson was decided as a matter of law. The holding was narrowly limited to the facts in which a motor vehicle "is actually used as a deadly weapon to run down the victim". Jackson, 662 So. 2d at 1372. This court recently receded from the hard-line rule of Ensor v. State, 402 So. 2d 349 (Fla.1981), which indicated that whether a weapon

is concealed is always a question of fact for the jury. Dorelus v. State, 474 So.2d 368 (Fla. 1999). In Dorelus, the court held that whether a partially-concealed weapon is a concealed weapon under the undisputed fact that the officer was able to see the silver butt of the gun sticking out of the console, was a matter of law which the trial court properly decided. In the present case, the facts are undisputed. The automobile was not used a weapon to run down the victim and take her money, as in Jackson. The automobile was incidental to the robbery and used only to convey the perpetrators to and from the crime scene. The district court's analysis in this case would open the Pandora's box this court cautioned against in Houck and convert every simple robbery in which an automobile is used to a first degree felony.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that the Florida Supreme Court reverse the decision of the Fifth District Court of Appeal, reverse the conviction for armed robbery, and remand for imposition of conviction for simple robbery.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0410519
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Mr. Lennard L. Jenkins, DC# T05748, Central Florida Reception Center-Main, P.O. Box 628050, Orlando, Florida 32862-8050, on this _____ day of August, 2000.

_____
BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
BARBARA C. DAVIS
ASSISTANT PUBLIC DEFENDER

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APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS