ORIGINAL

IN THE SUPREME COURT OF FLORIDA

PAUL PARKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. SC00-880
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida and Appellant in the Fourth District Court of Appeal. Respondent was Appellee, below.

In the brief, the parties will be referred to as they appear before this Honorable Court. A copy of the decision is attached as Appendix.

The symbol "R" will denote the record on appeal, which consists of the relevant documents filed below. The symbol "T" will denote the transcript. "PB" will denote petitioner's brief on the merits and "RB" will denote respondent's brief on the merits.

CERTIFICATION OF TYPE FACE

Petitioner certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the statement in his brief on the merits.

SUMMARY OF ARGUMENT

Petitioner will rely on the summary in his brief on the merits.

ARGUMENT

POINT I

AS A MATTER OF LAW, THE FACTS AFFIRMATIVELY PROVEN BY THE STATE DO NOT SUPPORT THE CHARGED OFFENSE OF ROBBERY WITH A FIREARM; CONVICTING PETITIONER OF THIS OFFENSE CONSTITUTES FUNDAMENTAL ERROR.

Respondent argues this issue is not preserved for appellate review (RB 6-7). Petitioner concedes this argument was not raised at trial. However, as petitioner argued in his brief on the merits and in the district court below, his conviction for robbery of Linda Ward is fundamental error because the facts proven by the state as a matter of law do not constitute the charged offense. (PB 8). See Troedel v. State, 462 So.2d 392, 399 (Fla. 1985); Griffin v. state, 705 So.2d 572, 574 (Fla. 4th DCA 1398); K.A.N. v. State, 582 So. 2d 57, 59 (Fla. 1st DCA 1991); Brown v. State, 652 So.2d 877, 881 (Fla. 5th DCA 1995); Williams v. State, 516 So.2d 975 (Fla. 5th DCA 1987).

Despite respondent's contention, petitioner did not fail to acknowledge this Court's decisions in Jones v. State, 652 So.2d 346 (Fla. 1995) and Pangburn v. State, 661 So.2d 1182 (Fla. 1995). See respondent's brief p.7. Rather, as petitioner explained in his brief on the merits, the holding announced in these cases is inapplicable in the instant case (PB 7).

In general, if a person is unaware that her property is taken, it is not a taking by force or putting in fear. See Harris v.

State, 589 So. 2d 1006 (Fla. 4th DCA 1991) (discussed in petitioner's brief on the mer-its) . The taking is simply theft:, not robbery. However, in Jones, supra and subsequently in Pangburn, supra, this Court held that if force or violence render:; the victim unaware of the taking, the robbery statute is satisfied. Jones, supra at 349-350; Pangburn, supra at 1186-1187. In Jones and Pangburn, the victims were violently murdered. In both cases, the victims were unaware their property was taken because they were fatally attacked prior to the taking. Extreme violence, not merely the threat of harm rendered them unaware of the taking

In this case, Linda Ward was not in any way aware that her purse and skirt were removed from another room; she did not see, hear, or feel the taking. However, unlike in Jones and Pangburn, in this case no physical force was exerted on War-d.[1] A:; petitioner argued in his brief on the merit::;, the fact that she was put in fear is insufficient to support a robbery conviction when she did not even know that anything was taken from her. Harris, supra; Robinson v. State, 680 So.2d 481 (Fla. 1st DCA 1996)quashed and remanded 692 So.2d 883 (Fla. 1997); Walker v. State, 546 So.2d 1165 (Fla. 3d DCA 1989). Because these facts do not support petitioner's robbery conviction, the conviction must be reversed

[1] Ward and Knott said petitioner threatened to shoot, but as Ward testified, she never saw a gun and she did not hear much at the time because the alarm was going off (T 163, 176).

POINT II

BECAUSE PREMISES WERE OPEN TO THE PUBLIC AT THE TIME PETITIONER ENTERED, STATE CAN NOT SUSTAIN PETITIONER'S BURGLARY CONVICTION; ABSENT AFFIRMATIVE NOTICE THAT ACCESS IS RESTRICTED, CONTIGUOUS AREAS SHOULD BE CONSIDERED PART OF THE PREMISES OPEN TO THE PUBLIC.

Although respondent repeatedly asserts that petitioner opened a closed door when he went into the backroom in the convenience store, this was not the evidence at trial. No one testified that petitioner opened a closed door. Rather in describing the backroom, the clerk Richard Knott explained, "it has a door there, you have got to open the door to go inside." (T 166).Linda Ward, the other employee, said "There's an entrance from the outside and then there is a door between the store right at the end of the counters between the store that leads back into there."(T 173). These were the only references to the door between the shopping area and the backroom. The fact that the door is generally closed does not establish that it was closed at the time or that petitioner opened it . Nevertheless, respondent assumes as fact that. petitioner opened the door and relies on this to support the state's argument that this area was not within the premises open to the public (RB 10-11).

However, even if petitioner opened a closed door to enter the room, this fact would not support a burglary conviction. It is undisputed the store was open to the public at the time petitioner went into the backroom. This room, which Ward said was located at

the end of the counter, was readily accessible and there was no indication access was restricted (T 179). Even if the scope of premises for purposes of § 810.02 Fla. Stat. (1999) does not encompass the entire building, a closed door- inside a convenience store does not necessarily signify that an area is restricted. For example restrooms have closed doors. Despite respondent's emphasis on the door in this case, the only dispositive fact is that the store was open to the public at the time.

Petitioner does not dispute that the room was used as an office or a break room.[2] Rather, it does not make any difference how this room was used because the store was open to the public: Segmenting spaces within the store as not "open to the public" defeats the rationale and this Court's holding in Miller v. State, 733 So.2d 955,957 (Fla. 1998).

To resolve conflicts in the application of the burglary statute, Miller announced a bright-line rule: if the premises were open to the public at the time, this is a complete defense to burglary. Id. at 957. It is clear from the Court's analysis in Miller that even if some areas of a store are generally restricted to employees, such as space behind the cash register, this does not

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[2]Although respondent says this room was used for a separate business, according to Knotts' testimony, the building was designed so that the room could hold a separate business, but it was actually used as a break room for Shell station employees and as an office (T 166; RB 10).

change the analysis or change the fact that the premises, i.e. the store, is open to the public. In Miller, there was testimony at trial that the defendant took money from the store's register and that his fingerprint was found on the cash tray. Id. at 956. Although the public does not have consent to go behind the cashier's counter or to reach into the register, this Court reversed Miller's burglary conviction because it was clear the store was open for business at the time of the robbery. Accordingly, for purposes of §810.02, when a store is open to the public, it should make no difference for example, whether a defendant reaches into a cash register, rummages through a storage closet, or opens a door and takes something from a closed room within the store. Although the defendant may be guilty of robbery or theft, he is not guilty of burglary because the store was open to the public at the time.

In this case, respondent contends the issue is not preserved because it was not argued as an affirmative defense at trial. Although this Court has characterized the "open to the public" portion of the burglary statute as an affirmative defense, this is not an affirmative defense in the typical sense. Miller, supra at 347. The state's evidence against a defendant will establish the nature of the premises entered and at that point, there is nothing further for the defense to present in order to prove the premises were open to the public. In this case, as in Miller, this burden

was met even though the defense was not argued at trial, because it is clear from the record the store was open to the public at the time. In Miller the "open to the public" affirmative defense was not even argued to this Court on appeal.. Miller, supra at 957. Nevcrthe less, based on the Court's independent review of the record and the state's concession that the store was open, the Court reversed the burglary conviction. Id. In addition, just as it was unnecessary in Mil 1 er and in State v. Butler, 7.35 So.2d 481 (Fla. 1999) to prove that the defendant:; had consent to go behind the cashier-' s counter-, in this case, it is likewise unnecessary Lo prove that petitioner had actual consent to enter the room. Finally, because the store was open arid this is a complete defense to burglary, petitioner' s conviction constitutes fundamental error, which can be raised for- the first time on appeal. See Griffin, 705 So.2d at 574; Troedel, 462 So.2d at 399; K.A.N., 582 So.2d at 59; Brown, 652 So.2d at: 881; Williams, 516 So.2d 97.

Although this Court intended Miller to clarify the burglary statute, conflict will remain until the Court. interprets the scope of "the premises." If the Court decides not to treat the premises as the entire structure, at the very least, the Court should hold that "the premises" encompasses contiguous areas where there is no explicit or express notice that access is restricted. Subdividing the premises based on actual consent to enter a particular portion ignores the clear holding in Miller, encourages factual disputes,

and necessarily requires case by case, hair-splitting analysis beyond simply determining whether a store was open to the public at the time. For these reasons, this Court should reverse petitioner's burglary conviction.

POINT III

THE TRIAL COURT ERRED IN SENTENCING APPELLANT UNDER THE PRISON RELEASEE REOFFENDER (PRR) ACT BECAUSE THE ACT IS UNCONSTITUTIONAL.

This Court's recent decision in State v. Cotton and Woods v. State, 25 Fla. L. Weekly S463 (Fla. June 15, 2000) rejects constitutional challenges based on separation of powers, the prohibition against cruel or unusual punishment, and substantive due process. The Court's decision did not expressly address petitioner's arguments regarding the equal protection clause, restriction on the right to plea bargain, and the void for vagueness doctrine. In addition, rehearing is pending in Woods v. State on the separation of powers issue and the Act's impact on judicial discretion with respect to the Victim's Rights Act. To the extent these issues remain undecided, petitioner will rely on the argument:; in his brief on the merits.

CONCLUSION

WHEREFORE, petitioner respectfully requests the Court exercise its discretion to review the decision and resolve the issues presented in this case and to render the relief the Court deems appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Celia Terenzio, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 9th day of July, 2000.

JENNIFER BROOKS
Counsel for Petitioner