IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1930

STATE OF FLORIDA,

Petitioner,

-vs-

EUGENE MICHAEL BYARS,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA, was the prosecution in the trial court and Appellant in the District Court of Appeal of Florida, Fourth District. Respondent, EUGENE MICHAEL BYARS, was the Respondent in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings. The symbol "A." designates the Appendix to this brief.

STATEMENT OF THE CASE

Respondent was charged in an indictment with first degree murder, armed burglary of an occupied structure with assault and battery, violation of repeat violence injunction, and possession of a firearm with altered serial number (R. 1-2). Respondent moved to dismiss the burglary charge, Count II, because he claimed that the undisputed facts did not establish a prima facie case (R. 3-4). After a hearing, the trial court granted the motion to dismiss (R. 12).

The State appealed the motion to dismiss to the Fourth District Court of Appeal. The majority affirmed the dismissal of the burglary charge, holding that the decision in Miller v. State, 733 So. 2d 955 (Fla. 1988) required that the fact that the structure was open to the public be considered a complete defense to burglary, notwithstanding that Respondent was enjoined from entering the premises (A. 1-2).

The State filed a motion asking the Fourth District to certify the issue presented in this case as one of great public importance. The Fourth District complied, certifying the following question before this court:

> DOES A RESTRAINING ORDER ENJOINING A DEFENDANT FROM ENTERING A STRUCTURE WITHDRAW THE CONSENT ENJOYED BY MEMBERS OF THE GENERAL PUBLIC FROM ENTRY INTO THE STRUCTURE, THEREBY PREVENTING THE DEFENDANT FROM RAISING THE OPEN TO THE PUBLIC DEFENSE RECOGNIZED IN MILLER V. STATE, 733 So. 2d 955 (Fla. 1998)?

STATEMENT OF THE FACTS

Respondent was charged with the first degree murder of Kathleen Kincaid (R. 2). For two and a half years prior to her death, Ms. Kincaid worked at a children's consignment shop, Over the Rainbow, which is owned by Brenda Pickerall (T. 12-14). The business is open to the public Monday through Friday from 10:00 to 5:30 (T. 12).

Ms. Pickerall testified at the hearing that Ms. Kincaid had an injunction against Respondent on the date of her murder, indicating that Ms. Kincaid was separated from Respondent (T. 15). She said that the injunction precluded Respondent from coming into the store (T. 16). Identifying State's Exhibit One, Ms. Pickerall said that she also had a restraining order against Respondent on the date in question (T. 16-17). The injunction was issued pursuant to section 784.06, Florida Statutes, and prohibited Respondent from going to, in, or within 500 feet of Ms. Pickerall's place of employment (R. 17-21). Ms. Pickerall said that she had also told Respondent before and after obtaining the restraining order not to come into the store (T. 19).

On the date in question, September 17, 1998, the store opened at 10:00 a.m., and Ms. Kincaid had punched in at 9:15 a.m. (T. 20-21). Ms. Pickerall arrived at the store just before noon (T. 21). As she was walking in the parking lot to the store, she

heard what sounded like a gun shot (T. 21, 23). She stated that one of her customers ran out of the store yelling that someone had been shot (T. 24-25). Inside, Ms. Pickerall found Ms. Kincaid on the ground in front of the register barely breathing (T. 26).

SUMMARY OF ARGUMENT

The trial court erred in granting the motion to dismiss the burglary charge. Respondent’s showing that the shop which he entered to shoot the victim was open to the public did not serve as a complete defense to burglary since the State showed that Respondent was not a member of the general public entitled to enter the shop, for an injunction precluded Respondent’s entry there.

Indeed, the facts presented in the motion to dismiss established that Respondent no longer had the privilege of entering the shop for any purpose because there was a court ordered injunction in effect prohibiting Respondent from having any contact with the victim, including at her place of employment. In other words, despite the shop being open to the general public, it was not open to Respondent at the time he entered it with the intent to commit violence therein.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS, BECAUSE THE RESTRAINING ORDER ENJOINING RESPONDENT FROM ENTERING THE STRUCTURE WITHDREW THE CONSENT TO BE ON THE PREMISES OTHERWISE ENJOYED BY MEMBERS OF THE PUBLIC.

Relying on Miller v. State, 733 So. 2d 955 (Fla. 1999), the trial court apprehensively granted Respondent's motion to dismiss, because it determined that the defense's showing that the consignment store was open to the public at the time of the shooting was a complete defense to the burglary charge (T. 46, 49-50). It acknowledged that the State had a persuasive argument that Respondent did not have consent from the onset to enter the consignment shop, but determined that Miller was controlling (T. 42-50). On appeal, the Fourth District agreed that Miller controlled, and held that although the result might be "untoward," the fact that the store was open to the public was the determinative matter in the case. On review, the State submits that the trial court was not bound by the ruling in Miller because the facts in Miller were unlike those in the instant case.

In Miller, the defendants entered a convenience store during operating business hours, approached the register, and pulled out guns, demanding money from the register. The State argued that any consent that the defendants had to enter the store was withdrawn due to the defendants' actions. This court rejected the contention that the State could show that the consent was withdrawn after the

defense established that the defendants permissibly entered the store because it was open to the public. It said that the showing of the store being open to the public was a complete defense and that a later withdraw of consent was irrelevant. This court reasoned that otherwise, any time a person entered a structure open to the public with the intent to commit a crime therein, he would have committed a burglary.

In the instant case, though, the State did not argue that the shop withdrew any consent after Respondent entered the premises. Rather, it contended that Respondent **never** had consent to enter the shop in the first place, for there were two outstanding injunctions against him for which he was aware, which prohibited him from entering the premises. The State maintains, therefore, that the exact reasoning in Miller is inapposite to this case.

In Miller, the privilege to enter the building as a member of the public was argued to have been withdrawn at the time of the defendant’s criminal act. In this case, though, the State argues that any consent by virtue of Respondent’s status in the public was completely withdrawn prior to his entry into the shop, so that he was not privileged to enter the building in the first instance.

Moreover, the Miller decision did not anticipate the argument presented in the instant case, that certain facts warrant a finding that a certain individual may not be deemed a member of the general public. In this case, the State maintains that the fact of two

restraining orders against Respondent, one obtained by the victim and one by the shop owner, precluded the application of the open to the public defense because Respondent was signaled out and specifically excluded from the general public.

The State argues that as part of the defense showing that a structure was open to the public, a defendant must show, or at least rebut a claim to the contrary, that he was a member of the public permitted entry into the establishment. This proposition finds support in case law holding that once a repeat shoplifter is barred from a store, he may be found guilty of burglary or trespass from entering the store during the restricted period. For instance, in State v. Woods, 624 So. 2d 739 (Fla. 5th DCA 1993), the court upheld the defendant's conviction for trespass because it determined that the mall which the defendant had entered had previously given the defendant notice of a reasonable nondiscriminatory restriction for him not to return to the mall.[1]

The Woods court relied in part on the language in Corn v. State, 332 So. 2d 4 (Fla. 1976), in which the court upheld a trespass conviction against a man who returned to a mall after he had been asked to leave for behaving in a boisterous manner. The court stated that reasonable nondiscriminatory restrictions

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[1] The trespass statute prohibits entering or remaining in a structure without being authorized, licensed, or permitted. See Section 810.08(1), Florida Statutes. The State believes that the term "authorized" includes being open to the public.

pertaining to the use of a commercial mall may be placed on users. It also stated that the public's invitation to use the mall can be limited and, on abuse, can be withdrawn or revoked. Its rationale, in part, was that the invitation to shop presupposes that the conduct of persons coming in will be in keeping with such purpose.

The State maintains that in this case, Respondent's invitation into the shop as a member of the public had been previously terminated. Moreover, it is clear that Respondent did not enter the children's consignment shop to look for clothes, but instead entered it to shoot the victim.

In State v. Kutch, 951 P. 2d 1139 (Wash. App. 1998), the court found that the defendant committed burglary when he entered a shopping mall with the intent to commit a crime therein. It focused on the fact that mall security had banned the defendant from entry into the mall for one year after a shoplifting incident. It stated that the defendant's invitation to be on the premises had been expressly limited and that the defendant had exceeded that limitation. See also State v. Thompson, WL 1335211 (Wash. App. 2000)(unpublished opinion)(evidence sufficient to support burglary conviction where defendant directed by security not to come back to mall and defendant reentered mall with the intent to commit a crime).

The State's argument with regard to the defense's showing that a structure is open to the public also finds support in case law

holding that even as an owner of the property in question, a defendant does not have the right to enter the property if an order restraining him from doing so is in existence. In State v. Suarez-Mesa, 662 So. 2d 735 (Fla. 2d DCA 1995), the court ruled that a husband who has shared a house with his wife but has been restrained by court order from entering the property can be charged with burglary when he enters the premises to commit a crime. The court reasoned that a court order can negate a person's right to enter the premises, even if the person owns the premises.

A like result was reached in Commonwealth v. Majeed, 694 A. 2d 336 (Penn. 1997). The court in Majeed decided that although the defendant owned the residence, when he entered into a consent protection from abuse order, he voluntarily relinquished any license or privilege he had to enter the residence possessed by his wife. The court stated that to allow the defendant to escape liability for burglary would circumvent the purposes of the protective order. It said:

> Thus, the court, and the parties, specifically intended the PFA Order to protect Mrs. Majeed and her children from exactly the type of conduct Appellant committed. He forcibly entered the home with the intent to commit a crime or crimes therein. Moreover, his unlawful entry facilitated his harassment of Khadijah. If the only sanction for Appellant's unlawful entry were an indirect criminal contempt, the purpose underlying the Protection from Abuse Act would be frustrated. Instead, application of the law of burglary (and consequential restraint of liberty), under these circumstances, advances the purpose of the Protection from Abuse Act by discouraging domestic violence and unauthorized invasions of the home.

694 A. 2d at 339.

The Majeed court's statements illuminate how a decision to allow a defendant to merely claim that a store was open to the public when he arrived in order to avoid a burglary charge completely defeats the very purpose of a pending restraining order, to prevent the defendant from entering the store and harming the victim!

In State v. Peck, 539 N.W. 2d 170 (Iowa 1995), the court held that the defendant did not have the right, license, or privilege to enter the marital home because of the existence of a restraining order against the defendant. It concluded that by entering the home against the terms of the court order, the defendant exceeded any right to be in the home. Similarly, in People v. Smith, 943 P. 2d 31, 32 (Col. App. 1997), the court found that the defendant unlawfully entered the marital residence, for he was not privileged to do so because of the retraining order against him. See also State v. Gotur, WL 568032 (Wash. App. 1997)(unpublished opinion)(right as owner or lessee suspended when barred from property by restraining order).

In this case, Respondent violated the restraining order simply by entering the store. See Section 784.07 (2), Florida Statutes. He committed the crime of burglary, however, when he entered the store contrary to the proscription of the court order with the intent to commit a crime therein. Although the store was open to the general public, Respondent posed an exception to this

authorization or privilege because he had been ordered not to enter. Hence, Respondent failed to show that any authorization to enter the store as part of the public had not been permissibly restricted or withdrawn.

Stated differently, Respondent failed to show that the store was open to the general public which included himself as a member. In State v. Ocean, 546 P. 2d 150 (Or. App. 1975), the court held that where a defendant has been prohibited from entering any store of a retail chain without the permission of an officer of the corporate chain, the defendant is no longer a member of the general public to whom the premises are open. The court, therefore, upheld the defendant's conviction for burglary based on his entering the store with the intent to commit theft inside.

Petitioner urges this court to reach a like result in this case. It submits that if one was not privileged to enter premises because he was not invited, licensed, or a member of the general public in good standing during a time when the premises were open to the public, then upon entry, he has entered the premises unlawfully. In this case, Respondent was explicitly uninvited!

As noted by Judge Hazouri in his dissent, under the majority's interpretation of Miller, had the store owner been standing in front of the store holding a sign directing Respondent not to come in, Respondent still could not be convicted of burglary because the store was otherwise open to the public. The State

suggests that such a result is nonsensical because a property owner should be permitted to withdraw consent to enter his or premises prior to entry. See generally People v. Smith, 943 P. 2d 31, 32 (Col. App. 1997)(verbal warning that restraining order had been obtained prior to actual service sufficient notice that consent to enter marital home had been withdrawn). Hence, the State asks this court to answer the certified question in the affirmative.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to answer the certified question in the affirmative, and reverse the decision of the Fourth District affirming the trial court's dismissal of the burglary count, with directions to reinstate the charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Jeffrey L. Anderson, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on this ___ of October, 2001.

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CERTIFICATE OF TYPEFACE

Petitioner 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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