IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner/Appellee,	)	
	)	
versus	)	S.CT. CASE NO. SC02-2193
	)	
DANIEL J. BURRIS,	)	DCA CASE NO. 5D01-1913
	)	
Respondent/Appellant.	)	
______________________________	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERIT BRIEF OF RESPONDENT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent generally accepts the Petitioner's Statement of the Case and Facts as presented in the Merit Brief of the Petitioner.

<u>SUMMARY OF THE ARGUMENT</u>

The Respondent was charged by information with using an automobile as a deadly weapon in commission of a robbery. However, Florida Statute Section 812.13(3)(a), requires that the weapon must be "carried" for the commission of the offense. Because the Respondent did not carry the vehicle during the commission of the crime he cannot be convicted of the offense. The Respondent contends that the State's position that a driver of an automobile is at the same time "carrying" the vehicle, is at odds with both the commonly accepted understanding of the term and legislative use of the term.

ARGUMENT

WHETHER THE MANNER IN WHICH THE RESPONDENT USED THE AUTOMOBILE IN COMMITTING THE ROBBERY QUALIFIES AS A DEADLY WEAPON UNDER THE ROBBERY STATUTE.

The issue presented in this case is whether under the robbery statute the Respondent "carried" his automobile as a weapon or merely "used" it in commission of the robbery.

The police report indicated the Appellant snatched the pocketbook from the victim as he drove by in his vehicle and dragged her for an unknown distance because the strap of the pocketbook was wrapped around her arm and neck. (Vol. V, pages 41, 42) The car was not used to hit or run down the victim and in no ordinary sense did he "carry" the car.

> One of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature.

Green v. State, 604 So. 2d 471, 473 (Fla. 1992).

Florida Statutes Section 775.021(1) (2001) reads:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Under the facts of this case, it cannot be said that the Appellant "carried" an automobile as the term is commonly understood and defined despite the State's assertion to the contrary and reliance on Jackson v. State, 662 So. 2d 1369 (Fla. 1st DCA 1995). In Jackson, the court held that logic and common sense require that the verb "carry" has many meanings:

> There is no question but that a motor vehicle may qualify as a "deadly weapon" if used as was the automobile in this case. E.g., Williamson v. State, 92 Fla. 980, 111 So. 124 (1926); McCuller v. State, 206 So. 2d 30 (Fla. 4th DCA), cert. denied, 210 So. 2d 868 (Fla. 1968); Solitro v. State, 165 So. 2d 223 (Fla. 2d DCA 1964). Appellant does not argue to the contrary. Rather, as in the trial court, he contends that, because it is not physically possible for one to "carry" an automobile, the charge of armed robbery with a deadly weapon was legally insufficient, and should have been dismissed.
>
> We agree with the trial court that the intended meaning of the word "carry", as used in Section 812.13(2)(a), must be sought by use of logic and common sense. The verb "carry" has many meanings. One of the principal meanings ascribed to it is "to wear, hold, or have around one, in the sense of possessing. The Random House Dictionary of the English Language 319 (2d Ed. 1987) (unabridged). We are the opinion that ascribing such a meaning to "carry", as used in Section 812.13(2)(a), is perfectly consistent with the obvious intent behind that statutory provision. See, e.g. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981) ("legislative intent is to polestar by which the courts must be guided" in statutory construction, even when at odds with "the strict letter of the statute"). It seems to us that the clear intent behind

> Section 812.13(2)(a) is to deter the commission of robberies by persons possessing deadly weapons, and thereby to reduce the likelihood of death or serious injury to victims and bystanders. See, e.g., State v. Baker, 452 So. 2d 927 (Fla. 1984) (punishment is enhanced under statute for possession of deadly weapon during commission of offense; use of weapon is not necessary).

The First District's reliance on the Random House Dictionary appears to be misplaced in suggesting it supports their view that "carry" means "to wear, hold, or have around" in the sense of possessing.

The 1st edition of the unabridged Random House Dictionary of the English Language 227 (1st Ed. 1967) includes 49 definitions for the entry "carry." The first two definitions are as follows including example sentences in italics illustrating the meaning of the definitions:

> 1. To move while supporting convey transport: *He carried her a mile in his arms. This elevator cannot carry more than 10 persons.*
>
> 2. To wear, hold, or have around one: *He carries his change in his pocket. He carries a cane.*

The First District's interpretation is not supported by the illustrative sentences provided by Random House. Following the First District's interpretation of "to have around one" and "carry" no one should be surprised to hear someone claim "I carried the elevator over 100 floors to the top of the Sears Tower," or "As

a fetus I carried my mother for nine months." The First District's eisegetical approach leads to absurdities when applied in other contexts. It is doubtful that any eyewitness to the instant offense would testify that the Respondent snatched the purse while "carrying" a pick-up truck. Following the First District's interpretation, the statement "The defendant was carrying a skateboard when he snatched the purse" could accurately describe a scenario where a defendant held a skateboard in one hand and grabbed the purse from the victim with the other hand or the statement could describe a scenario where the defendant rode by the victim on a skateboard as he snatched the purse. The Respondent contends that the use of the word "carry" does not accurately describe both of the above scenarios. The commonly accepted understanding of the word "carry" is at odds with the First District's definition and is not what the legislature intended. In its opinion in the instant case, the Fifth District Court of Appeal correctly recognized that the First District's interpretation of "carry" is "arcane" and that in common parlance, automobiles carry people - people do not carry automobiles. The car in this case was used as a means of conveyance to carry the Respondent to and from a robbery. The Respondent did not carry the vehicle.

The State cites Raulerson v. State, 763 So. 2d 285 (Fla. 2000), to suggest that the Fifth District Court of Appeal erroneously believed that the word "carry"

must be given its plain and ordinary meaning.

As pointed out by the State in Raulerson, supra, this Court noted that:

> [o]ne of the most fundamental tenets of statutory construction requires that we give statutory language its plain and ordinary meaning, unless words are defined in the statute or by the clear intent of the legislature.

Quoting, Green v. State, 604 So. 2d 471, 473 (Fla. 1992) (emphasis added).

However, contrary to the State's assertions, it is not clear that the intent of the legislature compels this Court to adopt an arcane definition of "carry". Judge Harris' dissent in Jenkins v. State, 747 So. 2d 997 (Fla. 5th DCA 1999), which was quoted in part by the Fifth District in its opinion in this case, addresses the legislative intent issue.

> In Jackson, an automobile was found to be a weapon when it was used to "run down the victim after which the victim's wallet was taken as he lay at the side of the road, seriously injured." Thus, in Jackson, the vehicle, purposely used to disable the victim, was held to be a weapon. Jackson, even though we may find the result desirable, should cause us some concern because it appears to be in conflict with our opinion in Houck, in which we held in a case involving the definition of a weapon that "penal statutes are to be strictly construed and any ambiguity therein is to be resolved in scope and application in favor of the accused." Jackson, on the other hand, held that regardless of the 'strict letter of the statute', the court should look for legislative intent that would not lead to "an absurd or unreasonable result". In this spirit, the Jackson court interpreted the term

> "offender carried a weapon" as including the concept of the offender being carried by a weapon. If the offender "was wearing" the automobile while committing the offense then, according to Jackson, he "possessed" it and it was the fact that the offender possessed a weapon, not that he carried one, which was really of legislative concern. This liberal interpretation of the statute ignores the fact that the legislature may have chosen its terminology with care in order to limit the term "weapon" to the statutory definition contained in Chapter 790, Florida Statutes: "any dirk, metallic knuckles, slingshot, billie, tear gas gun, chemical weapon or destructive device, or other deadly weapon except a firearm or a common pocket knife" or, if not so limited, at least limited to weapons of similar characteristics. All of these items are capable of being carried, and if firearms (covered by a different section of the statute) are added to the mix, the legislature has by this provision banned all but the most exotic possibilities - planes, trains, and automobiles - as weapons. For example, a kitchen sink could qualify as a weapon if it was detached from its plumbing and carried during the robbery with the purpose to threaten or harm the victim. Houck inter- preted an enhancer provision which provided that a weapon could be determined from its use and held that any instrument "commonly recognized as having the purpose to inflict death or serious bodily injury upon another person" expanded the statutory list of weapons available for enhancement under that statute. Houck v. State, 634 So. 2d 180 (Fla. 5th DCA 1994). In our case, however, the legislature limited weapons to those subject to being carried. Because this interpretation is not per se unreasonable, the defendant is statutorily entitled to it.

Jenkins, supra at 1000, 1001.

There is no clear legislative intent expressed in the robbery statute to indicate

that the word "carry" includes the concept that people carry motor vehicles merely by using them.

In State v. Baker, 452 So. 2d 927 (Fla. 1984), this Court recognized a distinction between "using" a weapon and "carrying" a weapon:

> In virtually every case of armed robbery the deadly weapon carried by the perpetrator is the means by which he induces "force, violence, assault, or putting in fear", one of the elements of any robbery, armed or unarmed. However, the statutory element which enhances punishment for armed robbery is not the use of the deadly weapon, but the mere fact that a deadly weapon was carried by the perpetrator.

Baker, supra, at 929.

It is apparent that the words "use" and "carry" are not synonymous.

Section 775.02(1), Florida Statutes (2001), provides:

> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of constructions, it shall be construed most favorably to the accused.

Because there is no clear legislative intent that the word "carry" shall be interpreted in a manner inconsistent with its plain and ordinary meaning, the Respondent is entitled to have the robbery statute construed favorably to him. In this circumstance, the most favorable construction in the Respondent's view, is also in accord with the plain and ordinary meaning of the word.

This Court should affirm the Fifth District's interpretation of "carry."

CONCLUSION

BASED UPON the argument and authorities contained herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal in this case.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Charlie Crist, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Daniel J. Burris, Inmate No. X-10067, #L-2114-L, Graceville Work Camp, 5230 Ezell Road, Graceville, Florida 32440, on this ___ day of February 2003.

CERTIFICATE OF FONT

I CERTIFY that the size and style of font used in the foregoing brief of Respondent is 14-point Times New Roman, a proportionately spaced font.

____
THOMAS LUKASHOW
Assistant Public Defender

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A P P E N D I X