IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO.: SC02-2193
DCA case no.: 5D01-1913

DANIEL BURRIS,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

RICHARD E. DORAN
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #618550

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #773026
FIFTH FLOOR
444 SEABREEZE BLVD.
DAYTONA BEACH, FL 32118
(386) 238-4990/FAX 238-4997

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS:

STATEMENT OF CASE AND FACTS

The State charged the Defendant with robbery with a deadly weapon specifically alleging that the Defendant "did use a deadly weapon, to-wit: an automobile." (R 47). The defense filed a motion to dismiss in the trial court submitting that the information should be dismissed because it did not charge the Defendant with "carrying" the weapon. (R 56-59). The trial court denied the defense's motion to dismiss, and the Defendant pled nolo contendere while reserving the right to appeal the denial of his motion. (R 65-68).

The facts which led to the charges included the Defendant driving by the victim in his pick-up truck and grabbing the victim's purse. (R 41). The force and power of the truck knocked the victim to the ground. (R 41). Eventually, the victim testified at the sentencing hearing detailing the attack and her injuries. She stated

> Okay. I was robbed and I actually dream how it was done, I was dragged for several feet to the point until my knees got injured and it took me four months to be able to walk again. I had to go under some therapy, take some medication, it changed my life completely. There's still many things that I cannot do.
>
> I was very active, I'm a volunteer coach. I can't do that at this point because my knees are still in point, they're still swollen to some point.
>
> I do hope that the court would give this man the time he needs to actually rehabilitate because I don't wish this to be done again to anybody. I mean it was very horrendous, it has affected my family, my kids, my husband. …

(R 29-30).

The Fifth District Court of Appeal reviewed the issue and reversed. See Burris v. State, 825 So. 2d 1034 (Fla. 5th DCA 2002). In its opinion the Fifth District Court of Appeal reasoned that an automobile could not be "carried" and therefore a vehicle could not qualify as a deadly weapon under the robbery statute regardless of how it was used. The Fifth District Court of Appeal certified conflict with the cases of Nation v. State, 668 So. 2d 284 (Fla. 1st DCA 1994), and Jackson v. State, 662 So. 2d 1369 (Fla. 1st DCA 1995).

SUMMARY OF ARGUMENT

The fact that a robbery was committed by the Respondent in this case is undisputed. The only issue is whether an automobile can qualify as a deadly weapon under the robbery statute. It is the State's position that such an interpretation of the robbery statute clearly reflects the legislature's intent to increase the possible punishment for those who use a deadly weapon like a vehicle to help them commit their crime.

ARGUMENT

POINT OF LAW

WHETHER AN AUTOMOBILE WHEN FOUND TO HAVE BEEN USED AS A DEADLY WEAPON BY THE JURY QUALIFIES AS SUCH UNDER THE ROBBERY STATUTE.

The issue in this case is whether an automobile can ever be used as a weapon under the robbery statute. The First District Court of Appeal has twice addressed this issue and found that an automobile can qualify as a weapon; however, in the instant case the Fifth District Court of Appeal expressly disagreed with the First District Court of Appeal's decisions. It is the position of the State that an automobile does qualify as a weapon depending on how it is used in a particular case, that such an issue is a factual one to be submitted to the jury, and that the Fifth District Court of Appeal was incorrect in deciding that as a matter of law a vehicle can never so qualify.

The robbery statute provides

> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree...

Section 812.13, Fla. Stat. (2000). As already noted, the First District Court of Appeal reviewed this issue and specifically decided that an automobile could qualify as being able to be "carried" as a weapon. The First District Court of Appeal wrote in the case of Jackson v. State, 662 So. 2d 1369 (Fla. 1st DCA 1995):

> We agree with the trial court that the intended meaning of the work "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 of 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. ...

Id. at 1371-72. See also Nation v. State, 668 So. 2d 284 (Fla. 1st DCA 1996).

The Fifth District Court of Appeal in the instant case recognized that the First District Court of Appeal interpreted the statute differently writing:

> While there are, as Jackson observes, some definitions of the word "carry," that might encompass Burris's use of his automobile in this case, ...

Burris, 825 So. 2d at 1037. Nonetheless, the Fifth District Court of Appeal took a much more restrictive view of the word "carry" and decided that Burris could not have carried the motor vehicle as required by the robbery statute.

A review of some of the facts of the instant case would assist understanding how and why automobile should qualify as a weapon during a robbery when so used. The arrest report shows that the Defendant[1] drove by in his pickup truck and grabbed the

[1] The undersigned will refer to the Petitioner as the State and to the Respondent as the Defendant.

victim's purse. (R 41). The force and power of the truck knocked the victim off of her feet. (R 41). The victim to this robbery testified at the sentencing hearing and explained how she was dragged by the Defendant's car thus causing all her injuries. (R 30). She stated

> Okay. I was robbed and I actually dream how it was done, I was dragged for several feet to the point until my knees got injured and it took me four months to be able to walk again. I had to go under some therapy, take some medication, it changed my life completely. There's still many things that I cannot do.
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> I was very active, I'm a volunteer coach. I can't do that at this point because my knees are still in pain, they're still swollen to some point.
>
> I do hope that the court would give this man the time he needs to actually rehabilitate because I don't wish this to be done again to anybody. I mean it was very horrendous, it has affected my family, my kids, my husband. So I really do hope that the time that the State is asking is at least what he should get and I do hope that it will help him to get rehabilitated during that point.
>
> ...

(R 29-30).

The standard jury instructions for robbery define "deadly weapon" as a weapon which is used or threatened to be used in a way likely to produce death or great bodily harm. This definition is consistent with this Court's holding in the case of Houck v. State, 652 So. 2d 359 (Fla. 1995) (Houck originated in the Fifth District Court of Appeal). The issue in Houck dealt with whether pavement could qualify as a weapon. This Court ruled that it could not as a matter of law. 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 v. State, 634 So. 2d 180, 182 (Fla. 5th DCA 1994).

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. In fact, that is exactly what occurred in this case. The automobile was not being used as simply a conveyance to transport a defendant from the scene of the crime. Instead, it was used as a means to attack increasing substantially the force, violence, assault or putting in fear that is at the center of committing a robbery with a deadly weapon.

Case law clearly recognizes that an automobile can be a deadly weapon. See J.C.M. v. State, 375 So. 2d 873 (Fla. 2d DCA 1979); McCullers v. State, 206 So. 2d 30 (Fla. 4th DCA), cert. denied, 210 So. 2d 868 (Fla. 1968); Williamson v. State, 92 Fla. 980, 111 So. 124 (1926); see also Ingram v. Pettit, 340 So. 2d 922 (Fla. 1976), (recognizing that an automobile is by its very nature a dangerous instrumentality). In its opinion the Fifth

District Court of Appeal accepts the fact that an automobile can be a deadly weapon citing to section 775.087 of the Florida Statutes, and it also accepts the fact that "[t]here is no question that Burris used his automobile in the course of committing the robbery." Burris, 825 So. 2d at 1035. However, the opinion of the Fifth District Court of Appeal seems to put form over substance, and in its opinion decides that as a matter of law an automobile can never qualify as a weapon under the robbery statute regardless of how it is used.

The robbery statute contains increased enhancements based upon the carrying of a weapon or deadly weapon. Some objects by their very nature are deadly weapons regardless of how they are used such as firearms. However, most other objects qualify based upon their use.[2] The legislature's goal in the robbery statute would seem to be deter and punish those using weapons or deadly weapons to effectuate their robberies.

The Fifth District Court of Appeal submits that it is constrained by the plain and ordinary meaning of the work "carry." However, in the case Raulerson v. State, 763 So. 2d 285, 292 (Fla. 2000), 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**

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[2] Of course, there are some potential "weapons" which as a matter of law do **not** qualify as discussed in Houck.

legislature. Quoting, Green v. State, 604 So. 2d 471, 473 (Fla. 1992)(emphasis added). It would seem clear that the legislature intended to deter robbers from either having **or using** a weapon. In its opinion in the instant case, the Fifth District Court of Appeal recognized the fact that the enhancement at issue is applicable by the mere carrying and that use was not required. See State v. Baker, 452 So. 2d 927 (Fla. 1984). However, when a defendant takes the extra step and actually does use the weapon, it would seem to be commonsense that the legislature intended for the enhancement to be applicable.

As already noted, it would appear clear that the legislature intended to increase the punishment for use of deadly weapons and not all weapons are carried. For example, someone could have a package of explosives and could use them to threaten and place fear in the victims while taking their property. Another example could be a dog trainer who threatens a victim with an attack dog in order to rob them. If a defendant used these deadly weapons to assist the commission of a robbery, he should not be rewarded by a lighter sentence based upon a statutory construction which clearly circumvents intent of the legislature.

The Defendant in this case was charged with use of a deadly weapon. It is undisputed that an automobile can be used as a deadly weapon. Furthermore, it is not even disputed that the Defendant's vehicle was so used in the instant case. The only argument is that this Court should take a formalistic

interpretation of the robbery statute which does not take into account legislative intent and which abandons a commonsense rendering of the statute. Upon seeing the victim being dragged by his automobile, the Defendant did not release the purse; instead, he used this object to attack the victim increasing his opportunity to complete his robbery. Clearly, the force, violence, and fear in the instant case were all exacerbated by the Defendant's use of the deadly weapon of his vehicle. Additionally, as recognized by the First District Court of Appeal, automobiles even fall under the definition of the word carry. Therefore, an automobile can be used as a deadly weapon, was so used, and meets the definition of statute. It is the position of the State that the Fifth District Court of Appeal's restrictive interpretation of the statute should be reversed by this Court.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court reverse the decision of the Fifth District Court of Appeal and reinstate the decision of the trial court.

Respectfully submitted,

RICHARD E. DORAN
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #773026
FIFTH FLOOR
444 SEABREEZE BLVD
DAYTONA BEACH, FL 32118
(386) 238-4990/Fax 238-4997

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #618550

COUNSEL FOR PETITIONER

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 Thomas J. Lukashow, counsel for the Respondent, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of December 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL