IN THE SUPREME COURT OF FLORIDA

State of Florida,

Petitioner,

v. Case No. SCO3-179

Christopher Bryant Mosley

Respondent.

_____

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

This is an appeal by the state of the First District Court of Appeal's decision in the instant case which reversed the defendant/respondent's burglary conviction.

The fourteen-volume record on appeal will be referred to as "R" followed by the volume and page number. The petitioner's Initial Brief on the Merits will be referred to as "IB." For consistency, the respondent will follow the outline of the petitioner's Initial Brief.

II. STATEMENT OF THE FACTS AND CASE

The statement of the facts and case presented by the Petitioner omits certain facts which are necessary to a resolution of this cause, as follows:

The vehicle involved was taken from a repair shop in Orange County on January 28, 1998. (R XI 71, 80) Forty-two days later, on March 11, 1998, Columbia County Sheriff officers stopped the vehicle in Columbia County. (R XI 94-99, 101, R XII 227) The respondent, Mosley, was identified as the driver and only occupant of the car. A BB gun was recovered from the vehicle. (R XI 110, R XII 213-216, 238-239)

Mosley was arrested and charged by information in Columbia County with offenses resulting from the events of March 11, 1998. At a pretrial conference in July, 1998, the case was continued and it was noted that Mosley was then in federal custody. (R I 60) The cause proceeded to trial on September 1, 2000.

On appeal, Mosley argued that the trial court erred in denying the pretrial motion to dismiss and the motion for judgement of acquittal made during trial based on venue. (Appendix A - Issue I)

III. SUMMARY OF ARGUMENT

There are two manners of committing burglary, by a non-consensual *entering* with an intent to commit an offense therein; or, where the initial entry was lawful, by surreptitiously *remaining* with an intent to commit an offense therein. Delgado v. State, 776 So.2d 233 (Fla. 2000). In the instant case, the undisputed facts established that the initial entry was not consensual or lawful. Therefore, only the "entering" method of committing burglary was applicable.

The District Court of Appeal correctly determined the act constituting the offense of burglary - the entry of the vehicle with intent to commit auto theft - was committed and completed in Orange County, and only Orange County. The entry did not continue over the next forty-two days until the respondent's arrest in Columbia County. The state failed to prove, even to the lesser standard of a reasonable certainty, that Columbia County was the correct venue, as alleged in the information. The trial court erred in denying the respondent's pretrial motion to dismiss and motion for judgement of acquittal on the burglary count. The District Court correctly reversed the respondent's conviction for burglary. This Court should affirm that holding.

IV. ARGUMENT

ISSUE I
WHETHER THE DISTRICT COURT PROPERLY REVERSED THE RESPONDENT'S CONVICTION FOR BURGLARY DUE TO LACK OF VENUE, AS THE UNDISPUTED FACTS ESTABLISH THE OFFENSE OCCURRED SOLELY IN ORANGE COUNTY, RATHER THAN COLUMBIA COUNTY AS ALLEGED IN THE INFORMATION.

The information alleged the offense of burglary occurred in, and only in, Columbia County. However, the evidence established that the offense occurred in, and only in, Orange County. The District Court of Appeal reversed the respondent's burglary conviction, stating: "because this case involves an unlawful entry, the "remaining in" theory of burglary is inapplicable and cannot form a basis for venue in Columbia County. Mosley v. State, 842 So.2d 855, 858 (Fla. 1st DCA 2002).

A. JURISDICTION

The petitioner asks this Court to exercise its jurisdiction to resolve an 'irreconcilable' conflict between the District Court's opinion herein and State v. Stephens, 608 So2d 905 (Fla. 5th DCA 1992). This court need not do so, as the conflict has already been resolved by this Court's opinion in Delgado v. State, 776 So.2d 233 (Fla. 2000).

In Stephens, the district court concluded that burglary of a conveyance can be committed in "one of two alternative

ways: by breaking into the conveyance *or* by remaining in it with the intent to commit some other crime therein." The district court specifically rejected Stephens' argument that the "remaining in" language of the burglary statute applied only to an entry which was initially lawful, and the defendant later formed an unlawful intent to steal and remained therein. Id., at 907.

However, the reasoning of the Stephens decision is no longer valid in light of this Court's subsequent decision in Delgado, in which it concluded that, in conformity with the original intent of Florida's burglary statue, the "remaining in" language applies only in situations where the initial entry was lawful, but the "remaining in" was done surreptitiously. Since Delgado, the Fifth District Court of Appeal now recognizes that the theory it rejected in Stephens - that the "remaining in" language of the burglary statute does not apply where the original entry was unlawful - is now accepted law:

> In *Delgado,* which was originally decided one month before this case went to trial, [footnote omitted] the Florida Supreme Court interpreted the "remaining in" language used in Florida's burglary statute to permit a conviction for burglary for remaining in a conveyance or structure only when a defendant "surreptitiously" remained in a structure or conveyance. . . . However, because this is not a case where the facts could support a "surreptitious

> remaining," Valentine could not be convicted of burglary unless he had the requisite intent when he entered the vehicle.

Valentine v. State, 774 So.2d 934, 937 (Fla. 5th DCA 2001). This Court recently cited Valentine, with approval, in Floyd v. State, 27 Fla. L. Weekly S697 (Fla. August 22, 2002) *reh'g denied*, 28 Fla. L. Weekly S468 (Fla. Jun. 12, 2003).

E. MERITS:

1. Delgado is applicable to this case.

The petitioner asks this court to expressly recede from Delgado and acknowledge that Florida Statute, section 810.015 (2001), has nullified Delgado. (IB 6) However, whether Delgado was nullified by section 810.015 is irrelevant to the instant case. By its wording, section 810.015 states that it shall be retroactive to February 1, 2000. The offense here occurred prior to that date. Thus, even if the retroactivity clause is taken as valid, the statute does not encompass the instant offense. Floyd v. State, 27 Fla. L. Weekly S697, fn 29, (Fla. August 22, 2002) *reh'g denied*, 28 Fla. L. Weekly S468 (Fla. Jun. 12, 2003) ("because the events in Floyd's case do not fall within the window established by the Legislature for retroactive application of section 810.015(2), we need not address the issue of the retroactive effect of the statute".)

Delgado, however, is applicable to the instant case. Although the offense occurred in 1998, the case did not proceed to trial until 2000[1]. A second amended information was filed on August 31, 2000; seven days after the Delgado decision. The trial was held on September 1, 2000. In Delgado, this Court stated:

> This opinion will not, however, apply retroactively to convictions that have become final.

Id., at 241.

Thus, while Petitioner looks only to the date of the offense, the pertinent question is whether the respondent's conviction was final prior to August 24, 2000. It was not.

Petitioner quotes Jiminez v. State, 810 So.2d 511 (Fla. 2002) wherein this Court clearly states that the pertinent issue is whether the "conviction were final prior to the release of Delgado."[2] (IB 6) Nevertheless, here the

---

[1]The petitioner was apparently in federal custody during this time. (R I 60)

[2] The offenses in *Jiminez* occurred on October 2, 1992; the trial occurred in 1994; the initial appeal was decided in 1997. *Jiminez v. State*, 703 So.2d 437 (Fla. 1997). This Court held that Jiminez's convictions were final prior to the release of *Delgado.*

petitioner focuses only on the date the offense occurred, not when the conviction was final. (IB 7)

The cases cited by the petitioner do not support its "date of offense" theory. In Schrack v. State, 793 So.2d 1102 (Fla. 4th DCA 2001) the court held the case was "unaffected by Delgado" in that it involved entrance gained into a home by trick or fraud, which would support a conviction for burglary. The district court found that Delgado "does not change this general principle of law." In a footnote, the district court stated that because the events occurred prior to February 1, 2000, it would not discuss the enactment of section 810.015. Thus, Schrack's reference to the date of offense was in relation to the date of the retroactivity of the statute, not the application of the Delgado decision. The petitioner's reliance on R.C. v. State, 793 So.2d 1978 (Fla. 2d DCA 2001) is likewise misplaced.

Again, the Delgado decision clearly states that it applies to convictions which were not yet final. Thus, the definition of burglary as stated in Delgado was a correct statement of the law prior to the time the respondent's conviction became final. *See*, Bunkly v. Florida, 123 S.Ct. 2020, 16 Fla. L. Weekly Fed. S 317 (May 27, 2003).

2. The District Court of Appeal properly applied Delgado:

Petitioner's argument claiming a misapplication of Delgado focuses on the events in Orange County at the time the car was entered and stolen. Petitioner notes that "someone who slips unnoticed into a car awaiting repair at a service station has invaded the property of another person, and thus deserves to be guilty of burglary." (IB 11) The problem with this argument is that those events occurred in Orange County and are not the events for which the respondent was charged and convicted in Columbia County. The information alleged the offense of burglary occurred in, and only in, Columbia County. However, the evidence established that the burglary offense occurred in, and only in, Orange County. This was the basis of the respondent's pretrial motion to dismiss for lack of venue and motion for judgement of acquittal at trial, as well as the direct appeal regarding the denial of those motions. (Appendix A - Issue I) Indeed, this was the basis for the District Court's reversal of the Columbia County burglary conviction. Mosley, at 856,857-858. Based on the facts of this case, it is clear that the District Court properly applied Delgado.

Petitioner claims the District Court "mistakenly reasoned that 'remaining in' burglary can only be committed when the

initial entry was lawful." (IB 11) The District Court's reasoning was no mistake, but rather, was based on this Court's decision in Delgado and subsequent decisions.

In Delgado this Court held:

> The issue for this Court to consider is whether the phrase "remaining in" found in Florida's burglary statute should be limited to situations where the suspect enters lawfully and subsequently secretes himself or herself from the host.
>
> * * *
>
> The question before this Court is whether the Legislature intended to criminalize the particular conduct in this case as burglary when it added the phrase "remaining in" to the burglary statute. [FN4] The Third District Court in ***Ray*** correctly pointed out that some meaning must be given to the phrase "remaining in." ***See*** 522 So.2d at 967 ("Just as the consent defense must be given meaning, so must the "remaining in" alternative."). Yet, in giving meaning to the phrase "remaining in," the Third District Court has effectively wiped out the clause "unless ... the defendant is licensed or invited to enter." Under the Third District Court's reasoning, even if a defendant was licensed or invited to enter, the moment he or she commits an offense in the presence of an aware host, a burglary is committed. Therefore, in order to give meaning to the ***entire*** burglary statute (the "remaining in" clause and the "unless" clause), the "remaining in" clause should be limited to the defendant who surreptitiously remains.

Id., at 238, 239-240.

This Court's decision in Morrison v. State, 818 So.2d 432 (Fla. 2002) proves that it meant what it said in Delgado. In Morrison the defendant claimed that since he was an invitee

into the victim's dwelling, there was insufficient proof of burglary under Delgado. The Court rejected this argument, finding the facts did not support the claim that the defendant was an invitee:

> Therefore, Morrison's reliance on ***Delgado v. State,*** 776 So.2d 233 (Fla.2000), is misplaced, because this is not an instance where a defendant initially has consent to enter the dwelling and then that consent is subsequent -ly withdrawn. **In the instant case, the State maintained that Morrison never had consent to enter the victim's apartment. Thus, the jury was never asked to consider a "legally inadequate" theory of burglary as was at issue in *Delgado.***

Morrison, at 453, fn 13. (emphasis added)

This limitation on the 'remaining in' theory of burglary has been followed by each of the five District Courts: Mosley; Steverson v. State, 787 So.2d 165, 167 (Fla. 2d DCA 2001)(under Delgado, "a burglary based on the "remaining in a structure" provision was limited to factual situations where the defendant enters a structure lawfully and subsequently secretes himself or herself from the host"); Hernandez v. State, __ Fla. L. Weekly __ (Fla. 3rd DCA June 25, 2003)("The "remaining in" language in a burglary instruction only applies in situations where the "remaining in" is surreptitious."); Miller v. State, 828 So.2d 445, 446 (Fla 4th DCA 2002)("In *Delgado* ... the supreme court held that the "remaining in" language applied only in situations where the remaining was

done surreptitiously."); Valentine v. State, 774 So.2d 934, 937 (Fla. 5th DCA 2001)("the Florida Supreme Court interpreted the "remaining in" language used in Florida's burglary statute to permit a conviction for burglary for remaining in a conveyance or structure only when a defendant "surreptitiously" remained in a structure or conveyance.").

3. The District Court properly concluded there was no venue in Columbia County for the burglary count.

The state claims that the District Court's opinion was not based on "venue grounds or principles." (IB 12) However, citing to the Florida Constitutional provision and Florida Statutes section regarding venue, the District Court specifically stated its reversal was based on improper venue:

> We reserve the burglary conviction, because the charged was tried in the wrong **venue**...
>
> The Florida Constitution gives a defendant the right to be tried in the county where the crime takes place. *See* **Art. I, § 16**, Fla. Const. When the acts constituting the crime are committed in two or more counties, however, the trial may be held in any county where any of the criminal acts occurred. *See* **§ 910.05**, Fla. Stat. (1997). **Venue** is an essential element of the crime charged, and if the defendant can show that the crime did not occur in the **venue** alleged in the charging document, or that the prosecution has not presented sufficient proof that the crime occurred in the county where the trial was held, the conviction cannot stand. *See Tucker v. State,* 459 So.2d 306, 308 (Fla. 1984).
>
> Turning to the facts of this case, we agree with appellant that there is no evidence of burglary by

> unlawful entry of the vehicle in Columbia County so as to permit trial in Columbia County. The record shows that the Columbia County officers received a BOLO which advised them that the highway patrol was in pursuit of a stolen car that had just been involved in an armed robbery in Gainesville, Alachua County. The Columbia County officers joined the hot pursuit and arrested appellant when he drove into a ditch in Columbia County. Thus, as appellant asserts, there is absolutely no evidence that he unlawfully entered the car in Columbia County; rather he was pursued nonstop from one county to another while already in the vehicle.
>
> As explained above, because this case involves an unlawful entry, the "remaining in" theory of burglary is inapplicable and cannot form a basis for **venue** in Columbia County. **Venue** was therefore improper in Columbia County, and the burglary conviction must be reversed. ***See id.*** at 308.

Mosley, at 856,857-858 (emphasis added).

Florida Statutes, sections 910.03, establishes venue in the county in which an offense was committed. Petitioner's recitation of the exceptions to section 910.03, created by sections 910.04, 910.05, 910.06, 910.09 and 910.10, clearly shows that the legislature, despite having the ability to do so, has not created an exception applicable to the instant case. (IB 12) The statutory interpretation maxim "expressio unius est exclusio alterius"[the expression of one thing is the exclusion of another] applies. This Court is without authority to do as petitioner advocates, that is, judicially amend the venue statute. (IB 13)

V. CONCLUSION

Based upon the argument and authority presented, appellant requests that this Court affirm the District Court's opinion on Mosley v. State, 842 So.2d 855, 858 (Fla. 1st DCA 2002), reversing his conviction for burglary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas H. Duffy, Assistant Attorney General, at The Capitol, PL-01, Tallahassee, FL 32399-1050; and to Mr. Christopher Mosley, DOC# 215615, Calhoun Correctional Institution, 19562 SE Institution Drive, Blountstown, Florida 32424, on this date, July 15, 2003.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210, this brief was typed in Courier New 12 Point.

Respectfully submitted,

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APPENDIX

NANCY A. DANIELS
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