IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CHRISTOPHER BRYANT MOSLEY,

Respondent.

CASE NO. SC03-179

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Christopher Bryant Mosley, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of 14 volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellee was arrested on March 11, 1998, in Columbia County, after a high-speed chase that had commenced in Alachua County following an armed robbery there. I, 10; XI, 94, 98-114. A second amended information charged him two counts of aggravated assault upon a law enforcement officer with a deadly weapon, one count of grand theft while armed and one count of burglary of a conveyance while armed; all events were alleged to have occurred on March 11, 1998, in Columbia County. I, 8-9.

On May 1, 2000, Appellee filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(b), on the grounds that the grand theft and burglary charges arose in Orange, and

not Columbia, County. I, 84. On May 11, 2000, Acting Circuit Judge David Bembry granted the motion. I, 88; the same day, an order was signed by Circuit Judge Paul S. Bryan, I, 89. On May 25, 2000, the State moved for rehearing on the motion to dismiss. I, 93. On June 22, 2000, Judge Bryan granted a motion for rehearing. I, 121. After a hearing on July 12, 2000, Judge Bryan denied the motion to dismiss. I, 139; VI, 426.

The case proceeded to jury trial, at which Appellee was found guilty as charged. II, 255-256. The facts as testified to at trial were that the owner of a repair shop had taken in a car for some work and had left it parked in front of a service bay with the ignition key in it, for convenience sake; he and an employee heard the car start up and realized it was being stolen, after which the employee got in his car and gave chase, breaking off only when Appellee threatened him with a shotgun. XI, 71, 80-82.

Appellee appealed his judgement and sentence, arguing, *inter alia*, that the motion to dismiss should have been granted as to the burglary charge. The First District Court of Appeal initially affirmed the convictions, but, upon motion for rehearing, reversed the burglary conviction on December 31, 2002, certifying conflict with State v. Stephens, 608 So. 2d 905 (Fla. 5th DCA 1992) (on reh'g). Mosley v. State, 842 So. 2d 855 (Fla. 1st DCA 2002). App. 1. The State's Notice to Invoke Discretionary Jurisdiction was filed on January 30, 2003, and on May 2, 2003, this Court issued a notice that it had postponed

its decision on jurisdiction and established a briefing schedule.

SUMMARY OF ARGUMENT

ISSUE I. The Court below erred in applying the opinion in Delgado to the facts of this case. First, this crime in this case was committed before Delgado was decided. Even if that were not the case, the subsequent passage of section 810.015, Florida Statutes, has rendered Delgado a nullity. Second, to the extent that Delgado applies at all, it would not apply in the context of this case, where the defendant broke into a car without permission and remained there until police captured him. There is no good policy reason not to permit the prosecution to lay venue in any county where a person who has committed burglary of a conveyance and grand theft auto is captured with the stolen vehicle, and there are good policy reasons to construe the law in this way.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY DENYING THE MOTION TO DISMISS BASED ON IMPROPER VENUE?

A. JURISDICTION

The court below certified express and direct conflict between its decision and State v. Stephens on the same question of law. Thus, this Court has discretionary jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi). The State submits that this Court should exercise its jurisdiction here, in that the conflict between this case and Stephens is irreconcilable. Under Stephens the State may try someone for burglary of a conveyance in either the county in which the car was broken into or in any county in which the defendant is apprehended. Under Mosley venue is only proper in the county were the illegal entry occurred. Moreover, this case raises questions as to the scope of Delgado v. State,776 So. 2d 233 (Fla. 2000), which addressed the application of the "remaining in" language from Florida's burglary statute, albeit in a different context.

B. STANDARD OF REVIEW

This case presents a pure question of law, which is reviewed *de novo*. Armstrong v. Harris, 773 So. 2d 7, 12 (Fla. 2000).

C. THE TRIAL COURT'S RULING

The trial court denied the motion to dismiss without stating any rationale. I, 139; VI, 426.

D. THE APPELLATE COURT'S DECISION

The First District Court of Appeal reversed the lower court's ruling, holding that State v. Stephens, 608 So. 2d 905 (Fla. 5th DCA 1992), which permitted the State to try a defendant for burglary of a conveyance in the county where the defendant was captured, even if that is a different venue from where the burglary occurred, was incorrect under the Delgado opinion. Mosley v. State, 842 So. 2d at 857.

E. MERITS

1. Delgado Does Not Apply To This Case

The crime in question was committed in 1998. On August 24, 2000, after the trial court had denied the motion to dismiss, this Court issued its Delgado opinion. In 2001, however, the legislature passed section 810.015, Florida Statutes, which states:

> (1) The Legislature finds that the case of Delgado v. State, Slip Opinion No. SC88638 (Fla. 2000) was decided contrary to legislative intent and the case law of this state relating to burglary prior to Delgado v. State. The Legislature finds that in order for a burglary to occur, it is not necessary for the licensed or invited person to remain in the dwelling, structure, or conveyance surreptitiously.
>
> (2) It is the intent of the Legislature that the holding in Delgado v. State, Slip Opinion No. SC88638 be nullified. It is further the intent of the Legislature that s. 810.02(1)(a) be construed in conformity with Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Geminis v. State, 703 So. 2d 437 (Fla. 1997); Robertson v.

> State, 699 So. 2d 1343 (Fla. 1997); Routly v. State, 440 So. 2d 1257 (Fla. 1983); and Ray v. State, 522 So. 2d 963 (Fla. 3rd DCA, 1988). **This subsection shall operate retroactively to February 1, 2000.**

(Emphasis supplied.)

The lower court found, based on its own decision in Foster v. State, 27 Fla. L. Weekly D1367 (Fla. 1st DCA, June 12, 2002) and Braggs v. State, 815 So. 2d 657 (Fla. 3d DCA 2002) (en banc), review granted, No. SC02-524 (Fla. Oct. 23, 2002),[1] that since "the Legislature cannot nullify a judicial decision retroactively" and that since this Court has not receded from Delgado, that opinion still applied in this instance, irrespective of section 810.015. 842 So. 2d at 857. The State respectfully submits that the lower court was wrong and urges this Court to recede expressly from Delgado, acknowledging, as did the court in R.C. v. State, 793 So. 2d 1078, 1079 n.1 (Fla. 2d DCA 2001), that the statute has nullified Delgado.

Even without an express nullification, however, it is clear that Delgado does not apply. The fact that the crime in question was committed in 1998 appears to be crucial. This Court's opinion in Jiminez v. State, 810 So. 2d 511 (Fla. 2002) is illustrative. Jiminez filed a postconviction motion challenging

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[1] The Braggs court certified the following question as being of great public importance: "WHETHER SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, HAS LEGISLATIVELY OVERRULED DELGADO v. STATE, 776 SO. 2D 233 (Fla. 2000), FOR CRIMES COMMITTED ON OR BEFORE JULY 1 2001?" 815 So. 2d at 661.

his 1991 burglary conviction based on Delgado, and this Court rejected his challenge, noting:

> His convictions were final prior to the release of our opinion in *Delgado*. Retroactivity is therefore determined by the criteria set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). In order for *Delgado* to have retroactive application, it must: (1) emanate either from this Court or the United States Supreme Court; (2) be constitutional in nature; and (3) have fundamental significance. *Id.* at 929-30. We have determined that *Delgado* does not meet the second or third prongs of the *Witt* test; hence it is not subject to retroactive application. *See Delgado*, 776 So.2d at 241. Moreover, in its most recent session, the Legislature declared that *Delgado* was decided contrary to legislative intent and that this Court's interpretation of the burglary statute in Geminis's direct appeal was in harmony with legislative intent.

810 So. 2d at 512-513. Appellee's case is, like Jiminez, based on a crime that occurred before Delgado. If Delgado does not meet the Witt test for retroactivity, then neither does this case. Other courts have declined to consider Delgado issues when the crime occurred prior to that opinion being issued. Schrack v. State, 793 So. 2d 1102, 1104 n.1 (Fla. 4th DCA 2001); R.C. v. State.

Thus, there appears to be no "Delgado window," i.e., a certain period of time during which the holding applies, inasmuch as that opinion misapprehended the legislative intent in including the phrase "remaining in" in the burglary statute, and the Legislature has expressly noted that the Court misapprehended its intent. Likewise, there is no reason to apply the decision here, where no one below relied upon it.

2. The District Court of Appeal Misapplied Delgado

Even if Delgado were to apply, it would not apply to the facts set out here. It is clear that Delgado is limited to situations where the initial entry was lawful. "The 'remaining in' language applies only in situations where the accused remains in a dwelling of another surreptitiously." Alexandre v. State, 834 So. 2d 344, 346 (Fla. 4th DCA 2003). This distinction was noted in Morrison v. State, 818 So. 2d 432, 460 n. 13. See, also, Floyd v. State, 2002 WL 1926223 at *13, 27 Fla. L. Weekly S697 (Fla. August 22, 2002).

While this Court, in Floyd, has approved applying Delgado to burglary of a conveyance (relying on Valentine v. State, 774 So. 2d 934 (Fla. 5th DCA), review dismissed 790 So. 2d 1111 (Fla. 2001), at most Delgado stands for the principle that a person who enters a dwelling, structure or conveyance with consent and later commits a crime therein is not guilty of burglary, unless the "remaining in" was performed surreptitiously. 776 So. 2d at 240.

That situation is not what happened here, where the defendant did not have permission to be in the car at any time. Delgado does not require that any remaining-in burglary be a consensual-entry case; it requires that any remaining-in burglary show evidence of surreptitious entry. Moreover, inasmuch as Delgado arose in the context of an invitee who turns violent, rather than a car thief who is not apprehended until he has left the county, the reasoning in that case is not applicable.

In Delgado this Court considered a first-degree felony murder conviction where the underlying felony was burglary. The victims' bodies were found inside their home, and there was no evidence of forced entry by the defendant, who was an acquaintance. The Court noted:

> The State prosecuted this case on the premise that appellant's entry into the victims' home was consensual (i.e., appellant was invited to enter the victims' home) but that at some point, this consent was withdrawn.

776 So. 2d at 236. The Court stated the issue first broadly:

> 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.

Id. at 238, but later narrowed its focus as follows:

> 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.

Id. at 239, 240. The conduct in question is entry without permission. In this case, Appellee sneaked into the car while it was awaiting repair and drove off with it.

As a close analysis of Delgado demonstrates, what the Court sought to avoid is criminalizing otherwise innocent conduct. In the opinion the Court traced the development of the "remaining in" language in burglary statutes, and determined that the phrase should be limited to "stealthy" remaining. The Court noted:

At common law, burglary was defined as breaking and entering the dwelling house of another at night with the intent to commit a felony therein. See Model Penal Code, § 221.1 cmt. 1 at 61 (1980). The commentary to the Model Penal Code explains that the crime of burglary developed due to an effort to compensate for defects in the common law crime of attempt. See id. at 62-63. Over time, the definition of burglary has been expanded as a result of judicial interpretation and legislation. The following definition of burglary was approved in 1962 for the Model Penal Code:

> (1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

Id. § 221.1(1) at 60-61. The commentary explains that this definition attempted to limit the reach of the crime:

> *The offense has thus been limited in the Model Code to the invasion of premises under circumstances especially likely to terrorize occupants.* Most of the extensions of the offense that have been added by legislation over the years have been discarded.
>
> Id. cmt. 2 at 67 (emphasis added).

The comment also addresses the concept of unprivileged entry. The comment urges those states that have adopted the concept of "remaining in" within their statutes to limit the language to narrow circumstances involving a suspect who surreptitiously remains in premises after consensual entry:

> There is a difficulty with the ["remains unlawfully"] language, however, that should lead to its rejection. *As the Brown Commission pointed out, it literally would*

> *include "a visitor to one's home ... who becomes involved in an argument with his host, threatens to punch him in the nose, and is asked to leave; if he does not leave, but continues his threatening argument, he would ... be guilty of burglary." For this reason, the Final Report of the Brown Commission included in the burglary offense one who entered or "surreptitiously" remained without license or privilege.*
>
> Id. cmt. 3(a) at 68-71 (emphasis added) (footnote omitted). Other scholars agree that the "remaining in" language found in some state statutes should have limited application:
>
> > This common statutory expansion in the definition of burglary makes great sense. A lawful entry does not foreclose the kind of intrusion burglary is designed to reach, as illustrated by the case of a bank customer who hides in the bank until it closes and then takes the bank's money. Moreover, this expansion forecloses any argument by a defendant found in premises then closed that he had entered earlier when they were open. But for this expansion not also to cover certain other situations in which the unlawful remaining ought not be treated as burglary, it is best to limit the remaining-within alternative to where that conduct is done surreptitiously.

776 So. 2d at 236-237 (citations, footnotes omitted). Of special interest for this case is the emphasized passage from the comment to the Modern Penal Code: *"The offense has thus been limited in the Model Code to the invasion of premises under circumstances especially likely to terrorize occupants."* This point was emphasized in footnote 2. which said:

> When a person comes onto property by lawful means, he remains criminally accountable only for the acts he thereafter performs on the property, but his entry in itself imposes no special terror or invasion of privacy on the

> property holder so as to render the culprit guilty of burglary.

776 So. 2d at 243, n.2. Thus, there would be a good reason **not** to apply the rationale of Delgado to the situation presented here. 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.

The court below mistakenly reasoned that "remaining in" burglary can only be committed when the initial entry was lawful. Delgado did not address that question, nor did Floyd, nor did Valentine, where the entry was apparently consensual. The rationale in Delgado was to prohibit convictions for lawful acts. It was at least trespass for Appellee to enter the victim's car, so the rationale simply does not apply.

The court below did not answer the question on venue grounds or principles; it apparently felt precedent-bound by Delgado, even though it mis-read and over-applied that case. There is good authority for the proposition that the State should be able to lay venue in more than one county for burglary of a conveyance. For example, sections 910.02, and 910.03, Florida Statutes, make venue a defendant's choice when the actual county where the crime was perpetrated is unknown. Under section 910.04, Florida Statutes, someone who aids, abets or procures the commission of a crime in one county may be tried in the county where the aiding, abetting or procuring took place or in the county where the crime was committed. Similarly, under

section 910.05, Florida Statues, multiple acts constituting a single offense may be tried in any county were one of the acts occurred. A person who is in one county and commits an offense in another, or inflicts an injury in one county that causes death in another, may be tried in either county. §§910.06, 910.09, Fla. Stat. Finally, a person who steals property in one county and moves it to another may be tried in either county (which is why venue for the grand theft auto charge was proper in Columbia County). §910.10, Fla Stat. The "defendant's choice" provision does not apply to sections 910.04, 910.05, 910.06, 910.09, or 910.10.

This case shows why construing the burglary statute to support venue for burglary of a conveyance in the county of capture makes sense. Here, grand theft auto was triable in Columbia County, meaning the victim had to testify that the car in question was his and that he did not give it to the Appellee. If the lower court's decision is affirmed, he will have to testify again in the burglary trial, to establish that Appellee did not have permission to enter his car.

More to the point, any subsequent cases where the defendant breaks into a car to steal it in one county and is captured in another will require either two trials or that the State have no choice in venue. Typically, this would mean that the victim witness would reside in one county while the witnesses who could establish the defendant's possession of the vehicle – usually law enforcement personnel – would reside elsewhere. Thus, the

State would have to choose between inconveniencing the victim or the police agency.[2] The defendant, meanwhile, would not necessarily suffer any particular hardship for being tried in one county as opposed to another.

[2] For some small agencies, out-of-town travel could be a drain on limited financial and personnel resources.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 842 So. 2d 855 should be disapproved, the decision in State v. Stephens, 609 So. 2d 905 (Fla. 5th DCA 1992) and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Nancy Showalter, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on June 27, 2003.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Appendix C