IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CHRISTOPHER BRYANT MOSLEY,

Respondent.

CASE NO. SC03-179

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA CONSTITUTION STATUTES, RULES

PRELIMINARY STATEMENT

Parties (such as the State and Respondent, Christopher Bryant Mosley), will be referred to by party name. Passages in bold face are emphasized in this brief, rather than in the original source. "IB" will designate Petitioner’s Initial Brief, "AB," will designate Respondent’s Answer Brief, each followed by any appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The State relies upon its statement of the case and facts from the initial brief. Respondent’s brief adds no new facts that are relevant to the issues raised in this case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY DENYING THE MOTION TO DISMISS?

Respondent's arguments, including his position on jurisdiction, flow from the faulty assumption that Delgado, wherein this court misconstrued the legislative intent as to burglary, had some precedential value. It did not. The passage of section 810.015, Florida Statutes, negated this Court's decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000), which now has no force and effect. The Legislature's amendment of the burglary statute to address and correct the Delgado opinion had the effect of clarifying that Delgado is not now – and more importantly never was – the law of Florida.

A. This Court Has Discretionary Jurisdiction, and Should Exercise It To Resolve Conflict

The decision below holds that a person cannot be tried for burglary of a conveyance in any county except the one in which the vehicle was stolen; State v. Stephens, 608 So. 2d 905 (Fla. 5th DCA 1992) holds that a person who enters a car unlawfully in one county can be tried for burglarizing the car in the county of capture. Conflict could not be clearer, as the Court below recognized in certifying conflict with Stephens.

Respondent relies wholly on Delgado to argue that Stephens no longer has precedential value. There are several rebuttals to this position.

First, Delgado does not exist. The Legislature erased it from the State's case law. This argument will be explored more fully below.

Second, Delgado would not have overruled Stephens even had the Legislature not acted. The best that can be said of the Delgado opinion is that it would have established that lawful entry into a structure or conveyance did not become criminal when mischief broke out later, unless the invitee remained inside surreptitiously. It never established that someone who unlawfully enters a car with the intent to steal it and then takes off in the car cannot be tried for burglary of a conveyance in the county where he or she is captured, which is the issue here.

Third, even if Delgado did have some "window period" of applicability, it would now be closed, and yet the opinion in this case would make the law of the First District different from that of the Fifth.

Conflict is express and direct and must be resolved.

B. The Legislature Made the Delgado Opinion a Nullity

1. There Cannot Be A "Delgado Window"

Respondent argues that section 810.015, Florida Statutes, does not apply to this case because "section 810.015 states that it shall be retroactive to February 1, 2002. The offense here occurred prior to that date." AB at 6. Then, almost immediately, Respondent argues that the date that controls is the date of conviction, relying on language from Delgado that made the

decision applicable only to "convictions that have become final . . ." after that opinion was issued. 776 So. 2d at 241; AB at 6. Thus, Respondent argues variously that section 810.015 does not apply because it was to involve cases that arose after its effective date, but Delgado should apply because Appellant's conviction was not final until after Delgado was released. In addition to being inconsistent, Respondent's argument is wholly illogical, in an attempt to breathe life into the wholly moribund Delgado opinion.

In other words, Respondent is arguing that there is a "Delgado window," i.e., a period of time during which the holding in Delgado may apply and his case falls into it. In fact, that is not so and cannot logically be so. First, consider section 810.015, which states in relevant part:

> (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); Jimenez 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 Legislature stated that it considered the line of opinions beginning in Routly and continuing through Ray to Raleigh was the law of the state.

The principal authority in Respondent's argument is Floyd v. State, 27 Fla. L. Weekly S697 (Fla. Aug. 22, 2002), reh'g denied 28 Fla. L. Weekly S468 (Fla. June 12, 2003). In Floyd the Court applied Delgado reasoning to hold that a jury instruction that burglary could be committed when an intent was formed after lawful entry, and without surreptitious remaining, was fundamental error. In footnote 29, the Court addressed section 810.015:

> We are aware that in enacting section 810.015(2), Florida Statutes (2001), the Legislature stated its intent "that the holding in *Delgado v. State* . . . be nullified." However, the Legislature also stated that subsection (2) of § 810.015 would "operate retroactively to February 1, 2000." The events in Floyd's case occurred well before February 1, 2000. Therefore, 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. *See R.C. v. State*, 793 So. 2d 1078, 1079 n. 1 [(Fla. 2d DCA 2001)].

Floyd, 2002 WL 1926223 at *22. In R.C. the Second District Court of Appeal construed subsection (2) to mean that any events that occurred prior to the date of the statute's retroactivity would still be governed by Delgado. 793 So. 2d at 1079, n. 1.

One difficulty with this position is that Delgado held that it would have prospective effect only, i.e., from the date the opinion was issued. 776 So. 2d at 241; see also Jiminez v.

State, 810 So. 2d 511, 512-513 (Fla. 2002). Close analysis of the holdings in Delgado, Jiminez and Floyd will show that there is no period during which Delgado's holding and rationale can be considered valid.

Before February 1, 2000, the law regarding burglary was stated in a line of cases beginning with Routly v. State, 440 So. 2d 1257 (Fla. 1983) and continuing through 1997. After February 1, 2000, the law regarding burglary was stated in the same line of cases. When, then, would Delgado apply? It cannot apply backward from February 3, 2000, by its own terms. It cannot apply after February 1, 2000 by the terms of section 810.015. In short, it does not exist, and cannot exist. Since Delgado cannot operate retrospectively, R.C.'s holding that the overruling of Delgado in section 810.015 not apply to cases prior to Delgado cannot be justified.

Thus, with the passage of section 810.015, Delgado never happened and does not, as any sort of authority, exist. That being so, Respondent's assertion, based on language from the opinion under review – "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," IB at 3 (emphasis in original) – is not a correct statement of Florida law, and was not a correct statement of Florida law when this Court decided Delgado. In fact, burglary may be committed by remaining in a structure or

conveyance openly and notoriously, and, moreover, intent may be formed after a lawful entry. That was the law before and after Delgado – indeed, it has been the law since the Legislature added "remaining in" to the burglary statute, and has never not been the law.

2. Floyd and R.C. Misconstrued Legislative Intent

The State acknowledges that this Court has been somewhat reluctant to accept the notion that Delgado has no applicability to any case, but as any dispassionate analysis of the statute shows, Floyd and R.C. are incorrect on this point. The Legislature's intent is obvious, and that intent was **not** to establish a Delgado window. Consider the facts:

This Court initially released Delgado on February 3, 2000, and did not release the present opinion, on rehearing, until August 24, 2000. At its next opportunity, in the 2001 session, the Legislature enacted section 810.015, Florida Statutes, which states, in part:

> (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. . . .
>
> (2) It is the intent of the Legislature that the holding in Delgado v. State, Slip Opinion No. SC88638 be nullified. . . . This subsection shall operate retroactively to February 1, 2000.

The effect of this statute and the legislature's clear intent in passing it, is to eliminate Delgado. The notion that the Legislature was attempting to create some period of

applicability for Delgado is unsupportable in the face of the clear language in the statute. Moreover, as noted in Braggs v. State, 815 So. 2d 657, 660 (Fla. 3d DCA 2002),[1] the court noted:

> It is evident the February 1 date was chosen in an effort to turn back the clock to the interpretation of the burglary statute as it existed two days prior to the original release of the Delgado opinion. As stated in the House of Representatives legislative history, "The purpose of this provision is to 'resettle' the law with respect to pending burglaries and leave them undisturbed by the Delgado decision." House of Representatives Committee on Crime Prevention, Corrections & Safety Final Analysis, Bill No. HB953(PCB CPCS 01-03), June 26, 2001.

See, also, Floyd, 2002 WL 1926223 at *20 (dissenting opinion of Justice Wells).

It is clear that by passing section 810.015, the Legislature intended to erase Delgado completely, rather than to establish a period of applicability for that decision. For the reasons set out in the Initial Brief, the State urges the Court to eliminate all doubt and recede from Delgado and, to the extent necessary, Floyd.

3. The Legislature's Statement of Its Own Intent Controls

In Braggs this Court is considering whether to recede from Delgado. The State maintains that the Court must do so, because that opinion was solely an interpretation of the legislative intent as to section 810.014, Florida Statutes. "The question

[1] This Court has accepted received briefs and oral arguments in Braggs, SC02-524, and its companion case, State v. Roberto Ruiz, SC02-389.

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." 776 So. 2d at 239-240. The Legislature has corrected the Court as to its intent, and that decision must stand.

Establishing what conduct is criminal is the Legislature's prerogative; burglary is not a common law crime in Florida. See §775.01, Fla. Stat. Irrespective of whether the Court's notions on the theory of burglary and what proof should be required to support a conviction for that crime, the fact remains that definitions of crimes are the sole province of the legislature, and no appellate court can substitute its judgment for that of the elected legislators who establish such matters under the Florida Constitution. Art. II, §3, Fla. Const.; art. III, §1, Fla. Const.; Johnson v. State, 660 So. 2d 637, 646 (Fla. 1995) (questions about the propriety, as opposed to the legality, of the death penalty are political debate and not justiciable in court); Krischer v. McIver, 697 So. 2d 97, 104 (Fla. 4th DCA 1997); State v. Avatar Devel. Corp., 697 So. 2d 561, 564 (Fla. 4th DCA 1997).

C. Even If Delgado Survived, It Would Not Apply Here

Respondent relies on Floyd to argue that because his case came to trial after Delgado that opinion should apply to him. The State disagrees. The crucial date in analyzing these cases should be the date of the offense. On that date, January 28, 1998, the law of this state was that anyone who stole a car

could be prosecuted for burglary in the county where he or she was captured. Indeed, the leading case in this matter, Stephens, involved circumstances that, for purposes of legal analysis, are indistinguishable from those here (the only difference was the much greater passage of time in this case).

So, when he took the car and drove it off to distant locales, Respondent knew, constructively at least, that he was amenable to prosecution wherever he was stopped. If Respondent were to do the same thing today, the same result would – or should – apply. He remained in the car in Columbia County, and, therefore, committed the crime of burglary of a conveyance in that county. When venue can be laid in more than one county, the State can choose which county in which to bring the charges. §910.05, Fla. Stat.

Thus, no unfairness to Respondent would arise from the trial court's ruling. While someone who committed burglary between the Delgado opinion and the passage of section 810.015 conceivably conceivably be able to fashion a notice argument, Respondent cannot.

Respondent's reliance on Bunkley v. Florida, 123 S.Ct. 2020 (2003) is misplaced. Bunkley involved putatively innocent conduct, carrying a "common pocketknife" – i.e., one with a blade less than four inches long – during a burglary. Id. at 2021. While this Court had ruled in L.B. v. State, 700 So. 2d 370, 373 (Fla. 1997) that such a knife would not support a conviction for burglary while armed, this Court had refused

Bunkley's claim involving his 1989 conviction. Id.; Bunkley v. State, 833 So. 2d 739 (Fla. 2002). This holding violated the principle of Fiore v. White, 531 U.S. 235 (2001), the United State Supreme Court held. 123 S.Ct. at 2023. Bunkley does not involve a legislative action erasing a judicial decision that misconstrued the legislature's intent. Respondent's assertion that "the definition of burglary as stated in Delgado was a correct statement of the law prior to the time respondent's conviction became final," is not supported by Bunkley.

D. Delgado Was Never Properly Applied Here

As noted in the initial brief, the Court's concern in Delgado was to avoid making illegal, conduct that was not criminal when it occurred, i.e., entering a house or car at the invitation of the owner. Respondent's conduct does not fall into that category. He stole a car from a repair shop. Thus, Valentine v. State, 774 So. 2d 934, 937 (Fla. 5th DCA 2001), where a jilted lover got into a car with his ex-paramour and, after an argument broke out over a camera, beat her up, has no applicability here. At best, this Court's approval of Valentine in Floyd would incorporate the Delgado holding – i.e., lawful entry, later violence – to conveyances. It would not speak to unlawful entry cases, such as this one.

Moreover, Delgado does not address venue, and, indeed, this is a venue issue and is procedural, not a matter of substantive criminal law.[2] The question was not whether the State could charge burglary of a conveyance but, rather, where the trial would be held.

If the State is correct and burglary of a conveyance is committed by remaining in – i.e., continuing to use – a car

[2] Respondent's motion to dismiss was apparently incorrectly pleaded in that a criminal information can only be dismissed on venue grounds for failure to allege venue, accompanied by prejudice to the accused. See Tucker v. State, 459 So. 2d 306, 308 (Fla. 1984). The proper motion would have been under Florida Rule of Criminal Procedure 3.240, for change of venue. The State did not raise this point below, and, therefore, does not raise it here, except to illustrate another argument.

after it has been stolen, then the crime was committed in Columbia County, Orange County and any other county in which the State could prove the defendant was present in the vehicle.

The State is not asking this Court to "judicially amend" the venue statute. AB at 12-13. The defendant – and others similarly situated – would still be tried in a county where the crime was committed, inasmuch as burglary of a conveyance can be committed by remaining in a conveyance, irrespective of whether initial entry was lawful.[3]

Respondent's reliance on Morrison v. State, 818 So. 2d 432, 453, n. 13 (Fla. 2002) is misplaced. The discussion there says that the Delgado holding does not apply because the defendant entered premises – not a conveyance – without permission; it does not address whether he was guilty for remaining in the house. Id. Indeed, none of the authorities Respondent cites at pages 10 and 11 of the Answer Brief present the same factual situation as this one, except Valentine, which is distinguished above.

[3] Respondent did not rebut the State's policy arguments regarding the ability to prosecute burglars who steal cars and flee to remote locations in the county where they are captured. Tucker, cited in footnote 2, provides support for the State's position, inasmuch as it recognized that, while of constitutional dimension, there is no particular gravity to the right to be tried in the county where the crime was committed.

CONCLUSION

Based on the foregoing discussion and the discussion in the Initial Brief, the State respectfully submits the decision of the District Court of Appeal reported at 842 So. 2d 855 should be disapproved, and the judgment and conviction 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 August 4, 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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