IN THE SUPREME COURT OF FLORIDA

MELVIN D. WILLIAMS,	:	
Petitioner,	:	
vs.	:	Case No. SC11-1543
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

This case concerns the preserved error of the trial court's failure to give a defense requested jury instruction as required by §812.025, Florida Statutes (2008). Appellant argued in his initial brief in the district court that the argument was preserved. Initial Brief at 14.

The charges and convictions in the trial court were for burglary of a dwelling, dealing in stolen property, grand theft and providing false information in a pawnbroker form. (R25-29).

SUMMARY OF THE ARGUMENT

Jurisdiction was properly granted by this Court.

The error below was preserved in the trial court and fundamental error analysis does not apply to this case.

In Mr. Williams' case, the theft and dealing in stolen property charges involved the same property and therefore the crimes were based upon "one scheme or course of conduct." Thus, under section 812.025, Mr. Williams could not be convicted of both charges.

This Court should disapprove Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011), and Blackmon v. State, 58 So.3d 343 (Fla. 1st DCA 2011) and approve Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010).

ARGUMENT

UNDER SECTION 812.025, FLA. STAT. (2008), PETITIONER COULD NOT BE CONVICTED OF BOTH THEFT AND DEALING IN STOLEN PROPERTY WHEN BOTH COUNTS AROSE FROM A SINGLE COURSE OF CONDUCT AND THE JURY WAS NOT INSTRUCTED AS REQUESTED TO DECIDE BETWEEN THE TWO CRIMES, AND THE REMEDY FOR THIS ERROR IS A NEW TRIAL.

Jurisdiction was properly granted by this Court. The state argues that jurisdiction does not lie with this Court because section 812.025 does not apply to the facts of this case. The state defines a single scheme or course of conduct as one that would require the exact same property be taken and sold on the same day. Answer Brief at 11-14. Therefore, according to the State, a fence who took possession of one large amount of property and sold all that property in a single day would be subject to §812.025, but someone like Petitioner, who took items, keeping some items and pawning a few of them one day after the taking, would not be subject to §812.025, Fla.Stat. (2008).

The Fourth District determined that a single scheme or course of conduct was found when the state could not prove when the items were stolen and the stolen items were pawned on different days. Anderson v. State, 2 So.3d 303, 304 (Fla. 4th DCA 2008). The statute uses the words "single scheme or course of conduct" and not "single item or sale occurring on the same date." The facts of this case concern items all taken at the same time and some of those taken items pawned the day after the taking. These facts certainly fit within the statutory words

"single scheme or course of conduct."

No other district court outside the Second District Court of Appeal has interpreted section 812.025 so narrowly that the exact same property must be stolen and sold on the exact same day. See Wilkins v. State, 2011 WL 5253029 (Fla. 2d DCA 2011).

In this case the district court did not choose to apply that narrow construction, but instead noted in its opinion, "In this case, the trial court gave Mr. Williams the benefit of section 812.025, but it is not entirely clear from the evidence that he was entitled to its benefit." Williams v. State, 66 So.3d at 365. The district court decision appealed to this Court did not decide that Mr. Williams was not entitled to the benefit of section 812.025 as a matter of law. Instead the district court set forth the three certified questions concerning whether a trial court must instruct the jury under section 812.025 and the applicable remedy for failing to do so. The trial court gave Mr. Williams the benefit of section 812.025 and the district court did not determine section 812.025 does not apply to this case. That the district court wrote the record was not "entirely clear" in showing Mr. Williams was entitled to the benefit of section 812.025, is not a finding or legal ruling that Mr. Williams was not entitled to the benefit of the statute. As this case now stands before this Court, section 812.025 applies to the facts of this case as determined by the trial court and the district court. Additionally, the district court did not certify a question regarding whether one scheme or course of conduct

occurred in this case. Jurisdiction should not be deemed improvidently granted for grounds that have not been determined by either lower court.

Moreover, this Court should not adopt the narrow interpretation of section 812.025 suggested by the state for this case. The state chose to charge Mr. Williams in court two, grand theft, for stealing the exact same items it chose to charge him as having trafficked in court three, dealing in stolen property. (R25-27). The state in bringing the charges then defined the scheme and course of conduct as one and the same in its charging document and cannot here argue that separate schemes and courses of conduct occurred. The state defined the scheme and course of conduct in the trial court and cannot now redefine it to fit its argument before this Court.

The First, Third, Fourth and Fifth District Courts of Appeal have not adopted so narrow a reading of the scheme and course of conduct language found in section 812.025. A.M.W. v. State, 934 So.2d 565, 569-570 (Fla. 5th DCA 2006), rev'd on other grounds, State v. A.M.W., 975 So.2d 405 (Fla. 2007)(grand theft of jewelry, automobile equipment and household items and dealing in stolen property of only automobile equipment arose out of same scheme and course of conduct); Corvo v. State, 916 So.2d 44 (Fla. 3d DCA 2005)(where state charged theft of jewelry, TVs, cameras, wine and liquor and dealing in stolen property of jewelry and same scheme and course of conduct found); Toson v. State, 864 So.2d 552, 554-555 (Fla. 4th DCA 2004)(items taken from house,

tools, video recorder, computer equipment, fan, telephone, bicycle, TV, jewelry were part of same scheme and course of conduct when only computer equipment was pawned and jewelry pawned 2 weeks after the computer equipment); Stallworth v. State, 538 So.2d 1296-1297 (Fla. 1st DCA 1989); Jones v. State, 453 So.2d 1192 (Fla. 3d DCA 1984)(car and stereo taken, but only stereo sold); Kelly v. State, 397 So.2d 709 (Fla. 5th DCA 1981)(one week passed between theft and sale). Generally, this case law reflects an interpretation of the scheme and course of conduct language that applies section 812.025 when the items sold or trafficked were part of the items stolen and the sale has occurred within a week or two of the theft.

Few theft and dealing in stolen property offenses will the take place on the same exact day. If exactly all taken items must be pawned or trafficked on the exact same day in order for the provisions to apply, then the failure to pawn a single video game would require denial of the requested instruction. The events must be looked at as a whole. The taking in this case occurred as a single event and items from that single taking were then pawned. These facts fall within the statutory language of a single "scheme or course of conduct." Accordingly, the trial court should have instructed the jury to return a verdict for one but not both dealing in stolen property and grand theft.

This Court's decision in Hall v. State, 826 So.2d 268 (Fla. 2002), interprets section 812.025 as follows in accordance with the legislative intent: "Section 812.025 allows the State to

charge theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact must then determine whether the defendant is a common thief who steals property with the intent to appropriate said property to his own use or to the use of a person not entitled to the use of the property or whether the defendant traffics or endeavors to traffic in the stolen property. The linchpin of section 812.025 is the defendant's intended use of the stolen property." Hall v. State, 826 So.2d 268, 271 (Fla. 2002). In this case in which the property the state charged Mr. Williams with taking is the same property the state charged Mr. Williams with selling, a common scheme or course of conduct is established as a matter of law. Section 812.025 clearly applied to the facts of this case. Jurisdiction remains rightly with this Court.

The state's erroneously presents arguments about fundamental error in this case in which the error was plainly preserved below. The state's answer brief is riddled with confusing references to fundamental error in this case the error below was preserved. Answer Brief at 27, 29, 31-32, 35-37. The state acknowledges that the jury instruction was requested by Petitioner in the trial court and the district court has stated the error was preserved for appellate review. Answer Brief at 3. Williams v. State, 66 So.3d 360, 363 (Fla. 2d DCA 2011). Judge Altenbernd even subsequently reiterated this in the more recent Wilkins case. Wilkins v. State, 2011 WL 5253029 (Fla. 2d DCA , filed Nov. 4, 2011)("In *Williams*, which was decided after *Kiss*,

this court held that a new trial was not warranted on the basis of the trial court's failure to give an instruction on section 812.025, **even when the defendant requested the instruction and preserved the issue for review**."). The state's references to fundamental error in this case are misplaced and confusing, possibly directed towards other pending cases that do involve no requested jury instruction. Answer Brief at 27, 29, 31-32, 35-37. The state makes no argument regarding why the issue was not preserved. All the state's arguments regarding fundamental error have no applicability in this case and must be disregarded.

By hiding behind the fundamental error argument, the state completely ignores and fails to address Petitioner's arguments about the legislatively required fact finding role given to the jury in deciding whether to convict for dealing in stolen property or theft crimes arising out of the same occurrence. Choosing between the two crimes is a fact finding function that was given to the jury and the error is in removing a fact finding function from a jury. That error can only be repaired by letting a jury of Mr. Williams' peers who have been properly instructed to choose between dealing in stolen property and theft and make that jury fact finding in a new trial. It cannot be repaired by the judiciary not imposing a conviction for the lesser offense.

While this jury determination process is not "efficient" according to the State, Answer Brief at 34, the jury trial system is the system we have lived by for as long as our country has

existed. More efficient systems can certainly be fashioned, but not in compliance with our state and federal constitutions or in compliance with the legislative dictates of section 812.025.

The state also argues that no prejudice occurred because Petitioner was sentenced to fifteen years for the burglary conviction. Answer Brief at 30-31. The burglary conviction sentence has nothing to do with the prejudice resulting from not permitting the jury to decide between the dealing in stolen property and grand theft convictions. The state's argument that no greater sentence can result from the error here because of the fifteen year burglary sentence, ignores the prejudice resulting from having the additional dealing in stolen property charge on his prior record. Mr. Williams remains convicted of a second degree felony and not a third degree felony. Should Petitioner face future criminal charges, he will face higher sentences because of the greater points given for past crimes of higher degrees. The prejudice of being convicted of dealing in stolen property and not merely grand theft cannot be decided by looking at the sentence on the burglary crime.

The state additionally argues that the proposed instruction requested in this case was inadequate and should have been rejected. Answer Brief at 25-26. This argument is raised for the first time in this court and was not made and was therefore waived in the district court. The district court determined below that no jury instruction could comply with the statute's requirements. Either the statute can be enforced through a jury

instruction or it cannot. The proposed instruction presented to the trial court tracked the statutory language. The state was free to make suggestions and modifications to the proposed instructions. The state waived this argument below at trial and in the district court and cannot claim for the first time to this Court that the proposed instruction was inadequate. (T188-199).

The trial court determined the proposed instruction was "woefully inadequate," and further found "there is no way humanly possible for this Court to the [sic] craft a lawful instruction given the absence of guidance from our appellate court as it relates to April 20, 2009." (T199). The error claimed here cannot be disregarded merely because defense counsel below did not craft an instruction when the trial court determined doing so was in "no way humanly possible." The proposed instruction in this case was adequate for apprising the trial court of the lawful requirement of instructing the jury in order to comply with section 812.025. The trial court did not fail to instruct the jury because it was not given a properly crafted proposed instruction, but did not instruct the jury because it determined no such jury instruction could ever be crafted, as did the district court. (T199). Williams v. State, 66 So.3d at 361 ("the procedural requirements in section 812.025 are unenforceable. . ."). A proposed jury instruction was fashioned by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases for section 812.025.[1] Thus the impossibility of crafting any

[1] *The Florida Bar News*, "Proposed jury instructions for criminal cases," 14.2

such instruction has been refuted. The instruction presented in this case was not rejected because of its wording, but because the trial court refused any jury instruction under 812.025. Therefore this matter cannot be decided on the basis of the wording of the proposed instruction. Moreover, the proposed instruction could be followed by the jury and should not have been rejected. Since a standard instruction has now been crafted and proposed, that instruction could properly be used in a new trial on the charges.

Without the legislatively mandated instruction required by §812.025, the jury did not know it had to choose between dealing in stolen property and grand theft and could not convict on both charges. The jury was given the power to determine which charge applies to the facts of a given case, not the judiciary. The harm here was in taking that power from the jury which is fully equipped to use it, and depriving Petitioner of the right to have a jury of his peers make a decision given to it to make by the legislature. Surely a judge could decide many things a jury is supposed to decide. But there are rules that determine who makes which decisions. As between theft and dealing in stolen property charges, the legislature has determined that the jury decides which crime applies to the facts of a given case, not the judge. The state can avoid this issue altogether in determining what charges to file, but once both dealing in stolen property and

(..continued)
and 14.3 Dealing In Stolen Property (Fencing 14.2) (Organizing 14.3) (May 15, 2011)
(http://www.floridabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b590067

grand theft are charged, the legislature has determined that in a jury trial the jury must decide between the two crimes. Accordingly this Court should quash and disapprove Williams v. State, 66 So.3d 360 (Fla. 2d DCA 2011), and Blackmon v. State, 58 So.3d 343 (Fla. 1st DCA 2011) and approve Kiss v. State, 42 So.3d 810 (Fla. 4th DCA 2010).

CONCLUSION

Based on the arguments and authority presented herein, Petitioner respectfully requests that this Court quash the decision of the district court, reverse the grand theft and dealing in stolen property judgments and sentences below and remand this case for a new trial on those charges.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Danilo Cruz-Carino, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of January, 2012.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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