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IN THE SUPREME COURT OF THE STATE OF FLORIDA

DEAN KENNETH ROCKMORE, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE No. SC12-577

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF THE PETITIONER

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The Second DCA, in Peterson v. State, held that a defendant is entitled to a special jury instruction on the defense of abandonment when the defense is that a defendant abandoned stolen property before using force to escape the scene of a shoplifting. The Fifth DCA, in Rockmore v. State, held that a defendant in almost identical circumstances is not entitled to a correct special instruction on the defense of abandonment, and that the standard instruction should apply. The Fifth acknowledged conflict with Peterson, disagreeing with its conclusion regarding the necessity of the special instruction on abandonment or relinquishment of property.

The trial court in this case modified the special instruction requested by the Petitioner, adding, at the request of the State, the proviso that the victim must be aware of the relinquishment of the property. Petitioner objected to the trial court's additional language. It is not required by case law or statute, and was erroneous.

The Respondent urges this Court to disapprove the application of the abandonment defense, as reflected by the jury instruction approved by the Peterson court. The Respondent further argues that the abandonment of property after detection by a store employee should not be a defense at all, and that such action does not qualify as a renunciation of the crime of robbery. Such an

argument ignores the fact that, when the Petitioner abandoned the store's property, the only crime he was guilty of at that point was shoplifting. In abandoning the store's property, he renounced the crime of shoplifting. When he refused to return to the store with the loss prevention employee he became guilty of resisting a merchant. His act of abandoning the property, at the employee's request, constitutes a break in events, deserving of a correctly worded special instruction on the defense of abandonment. The mere fact that the employee kept the Petitioner in his sight after abandonment of the merchandise does not convert the later threat into being part of continuous events. The Petitioner responds in support of the defense of abandonment, which he asserted at trial, and requests that this Court reverse the Fifth District's decision.

ARGUMENT

THE OPINION IN PETERSON IS IN DIRECT CONFLICT WITH ROCKMORE, AND THE FIFTH DCA ERRED IN FINDING THAT THE ABANDONMENT DEFENSE WAS COVERED BY THE STANDARD ROBBERY INSRUCTION. (RESTATED).

The Petitioner replies herein to refute the Respondent's argument that this Court should disapprove the defense of abandonment, as reflected by the jury instruction approved by the Second District Court of Appeal in Peterson v. State, 24 So. 3d 686 (Fla. 2d DCA 2009). Petitioner also replies to refute Respondent's argument that the abandonment of property after detection by a store employee should not be a defense at all.

The Second DCA, in Peterson, held that a defendant is entitled to a special jury instruction on the defense of abandonment when the defense is that a defendant abandoned stolen property before using force to escape the scene of a shoplifting. Peterson v. State, 24 So. 3d 686, 690 (Fla. 2d DCA 2009). The Fifth DCA, in Rockmore v. State, held that a defendant in virtually identical circumstances is not entitled to a correct special instruction on the defense of abandonment, and that the standard robbery instruction should apply. Rockmore v. State, 2012 WL 669065 (Fla. 5th DCA March 2, 2012). The Fifth acknowledged

conflict with Peterson, disagreeing with that court's conclusion regarding the necessity of the special instruction on abandonment or relinquishment of property. Id., at 5.

The Respondent argues that the defense of abandonment does not apply, while basing this assertion on a characterization of the Petitioner's behavior as "simply discarding the stolen property after detection by law enforcement or store personnel in order to facilitate flight." Brief for Respondent, at 10. Such an interpretation would circumvent the defense of abandonment, to the extent that abandonment would no longer be a defense when a person relinquishes stolen property. In the case at bar, the employee Mr. Arnold told the Petitioner he just wanted the merchandise back. (T 77, 78, vol. 1) Petitioner returned the property, according to his testimony, and according to the testimony of Mr. Arnold, he at least returned the T shirts. (T 77, vol. 1; T 241, vol. 2; T 239-240, vol. 2) After dropping the shirts and, according to the Petitioner, also the socks, Petitioner then told the employee "there's your merchandise ..." (T 78, 239-241). He did not "simply discard" property. Rather, he responded to the store employee's request for the return of the property and verbally renounced the shoplifting by telling the employee: "there's your merchandise."

Respondent further argues that the abandonment of property after detection

by a store employee should not be a defense at all, and that such action is not a renunciation of the crime of robbery. This argument ignores the fact that, when Petitioner abandoned the store's property, the only crime he was guilty of at that point was shoplifting. In abandoning the store's property, he renounced the crime of shoplifting. When he refused to return to the store with the employee, he became guilty of resisting a merchant. § 812.015(6), Florida Statutes. The mere fact that the employee kept the Petitioner in his sight after the abandonment of the merchandise does not convert the later threat into continuous events. His act of abandoning the property, at the employee's request, constitutes a break in events which is supported by some evidence, deserving of a correctly worded special instruction on the defense of abandonment. Peterson, at 690. As in Peterson, here the defense presented a version of the evidence that warranted the right special instruction. Id.

In Peterson, the defendant was seen in the socks and underwear aisle putting items in the waistband of his pants. Peterson v. State, 24 So. 3d 686, 688 (Fla. 2d DCA 2009). He abandoned some items in a shopping cart while pushing an employee aside so he could get out of the door. Id., at 688. Some bystanders briefly grabbed his shirt as he fled, and the employee saw merchandise still packed around his waist. Id. In that case the trial court only gave the standard instructions,

rejecting the defendant's request for a special instruction that "[i]f it is established that the property was abandoned prior to the use of force then you must find the Defendant not guilty of robbery." Id., at 689. The Second District court concluded that the standard instruction for robbery did not adequately cover Peterson's theory of defense, because it did not inform the jury that if the property was abandoned prior to the use of force, then under the law the taking and the use of force were not a continuous series of acts or events. Id., at 690.

A special instruction was given in the petitioner's case, albeit not the instruction he had requested. (T 173, 308) Petitioner objected to the trial court's addition of the words "and the victim was aware ..." (of the abandonment of property). (T 250-251, 253) The modification inserted by the trial court was requested and suggested by the State. (T 251-252) As such, the error in the instruction was invited by the State, and not by the defense. It would be patently unfair to penalize the Petitioner for an error that was invited by the State.

The additional language requested by the State, objected to by the petitioner, and included by the trial court is not part of the robbery statute. *See* § 812.13, Florida Statutes. The additional language served to negate Petitioner's defense of abandonment by implying that the defense would not apply if the victim was unaware of the abandonment of the property. This is a fallacy and

error, as it is the actions and intent of the defendant that form the basis for the defense of abandonment, not the perception of the victim. Section 812.014, Florida Statutes, defines theft as requiring that a person appropriate the property of another with the *intent* to temporarily or permanently deprive another of rights to the property. It follows then, that evidence of a person's intent to abandon stolen property or to renounce theft, is the question, not the perception of the witness.

The Respondent argues that the language in Rockmore, in which the Fifth District found the decision to be in conflict with Peterson, was dicta. Where language in an opinion is "ultimately immaterial to the outcome of the case," it constitutes dicta. Lewis v. State, 34 So. 3d 183, 186 (Fla. 1st DCA 2010). On the other hand, to the extent that a discussion is necessary to the panel's decision, it is binding unless overruled either by this court or a higher court. Sturdivant v. State, 84 So. 3d 1044, 1047 (Fla. 1st DCA 2010). In Rockmore, the court's discussion of the Petitioner's defense of abandonment was part and parcel of its' decision that the trial court in this case did not err in giving a modified, albeit erroneous, special instruction on the defense to robbery of abandonment of property. Given that the Fifth District Court's discussion of the defense of abandonment and how its' reasoning differs from that of the Peterson court constitute the underpinning of its decision, it was necessary to the court's decision and not dicta.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, the Appellant respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to Assistant Attorney General Pamela J. Koller, at pamela.koller@myfloridalegal.com and crimappdab@myfloridalegal.com, and was mailed to Mr. Dean Rockmore, 077708 Everglades C. I. 1599 S.W. 187th Avenue Miami, FL 33194-2801 on this 18th day of June, 2013.

Kathryn Rollison Radtke
Assistant Public Defender

CERTIFICATE OF FONT

I HEREBY certify that the size and style of type used in this brief is proportionally spaced 14 pt. Times New Roman.

Kathryn Rollison Radtke
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