0A 8-5-87 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,276

DAVID WILLIAMS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

FILED
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AUG 10 1987
CLERK, SUPREME COURT
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ON PETITION FOR DISCRETIONARY REVIEW

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BRIEF OF RESPONDENT ON MERITS

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PRELIMINARY STATEMENT

Petitioner, DAVID WILLIAMS, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the appellee before the Third District. The parties, in this brief, will be referred to as they appear before this Court.

The symbol "R" will be used, in this brief, to refer to the Record-on-Appeal which was before the district court. The symbol "T" will identify the transcript of lower court proceedings. The symbol "A" will designate the appendix to appellant's brief on the merits. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

That portion of petitioner's Statement of the Case and Facts which constitutes the Statement of the Facts, although generally true and correct, contains certain material errors and omissions which are corrected below as a condition of appellee's acceptance thereof:

Officer Caine, the canine officer who entered the burglarized store, testified that the loaded shotgun which was found was located directly at the petitioner's feet as he was in a crouched position and the rifle was in a leaning position appropriately one (1) foot from the petitioner's hands. (T. 21). The officer later discovered that both of these weapons had been loaded at the time, and the rifle was unloaded in his presence (T. 22). He testified that both the rifle and shotgun were within arm's reach of petitioner when he was located. (T. 27).

Officer Russell testified that he conducted the search of petitioner (T. 38) and identified the exhibits of three (3) cameras and jewelry as items that the officer found on him. (T. 38-40). Officer Russell testified, during direct examination, that he also found a .38 Smith and Wesson automatic in a pants pocket of the fatigue pants the petitioner was wearing (T. 41), that he had received training in firearms identification (T. 41-42) and that the weapon was not loaded at the time. (T. 42). The automatic was released to its owner. (T. 43). During cross-examination, the officer did initially testify that the gun was found in the lower left front pocket of the jungle pants the petitioner was wearing (T. 44) and then changed this testimony, when reminded of his deposition testimony, to the left rear pocket. (T.45-46).

Although this gun was released to its owner (T. 43, 47), no evidence established, as alleged in Appellant's Brief, that this was contrary to what is normally done. (Appellant's Brief, 5)(T. 46-47).

Mr. Burney, the employee of the burglarized pawnshop (T. 52), recognized the three (3) cameras and jewelry which had been taken from the petitioner as coming from a showcase in the pawnshop (T. 58-60) and testified that the value of the three cameras was one hundred twenty-five ($125.00) dollars, one hundred ($100.00) dollars and eighty ($80.00) dollars, respectively. (T. 61-62). Burney testified that, when the rifle and shotgun were found, both were loaded and had a round in the firing chamber. (T. 65-67). These guns had been left in a gun rock mounted hill on the wall in the office area of the shop (T. 67), but were found where the petitioner had gained entry to the shop. (T. 63-64). The guns were unloaded after the crime scene technicians arrived. (T. 68).

The petitioner testified as set forth in appellant's Brief (Appellant's Brief,6-7). However, it should be noted that the defendant admitted that, after he tried to get out of the shop once and failed (T. 76), he took the guns from the gun rack and carried them from the rack where they were mounted to the shop area of the pawnshop. (T. 76, 81-82).

QUESTION PRESENTED

WHETHER THE TRIAL COURT DID NOT REVERSIBLY ERR IN IMPOSING A THREE (3) YEAR MINIMUM MANDATORY SENTENCE FOR POSSESSION OF A FIRE-ARM DURING THE COMMISSION OF A BURGLARY? (Restated).

SUMMARY OF THE ARGUMENT

First, possessing a loaded rifle and shotgun inside the burglarized premises was possession of them during the burglary, just as assaulting or battering a person inside burglarized, premises is committing such a crime in the course of committing the offense, within the meaning of the burglary statutes. Holding that such possession of a firearm is not during the course of the offense would inevitably lead to an absurd result and is in conflict with other cases on the issue.

Also, evidence proved that the petitioner possessed a .38 automatic pistol during the burglary. The fact that petitioner was found not guilty of carrying a concealed firearm is not contrary to this result where no evidence was presented that the pistol was concealed, as required by the concealed firearms statute.

ARGUMENT

THE TRIAL COURT DID NOT REVERSIBLY ERR IN IMPOSING A THREE (3) YEAR MINIMUM MANDATORY SENTENCE FOR POSSESSION OF A FIREARM DURING THE COMMISSION OF A BURGLARY. (Restated).

The trial court did not reversibly err in imposing a three (3) year minimum mandatory sentence for possession of the firearm during the commission of a burglary because the evidence was sufficient to prove that the petitioner possessed a rifle, a shotgun and a pistol during the commission of the burglary concerned in this case. The jury clearly found, in its verdict, that the burglary was committed with a firearm (R. 14), and the evidence supports this verdict.

First, the evidence was sufficient to show that Mr. Williams possessed a loaded rifle and a loaded shotgun during the commission of the burglary. The defense relied below solely on one case, State v. Pilcher, 443 So.2d 366 (Fla. 5th DCA 1983). Pilcher reaches this result by holding that a burglary is complete when the premises involved are entered so that stealing a firearm from the burglarized building is insufficient "possession" of the firearm to apply the three year minimum mandatory provision of

F.S. §775.087 (1983). State v. Pilcher, 443 So.2d 366, 367 (Fla. 5th DCA 1983). However, as will be demonstrated below, the reasoning in that case is fatally flawed in that it ignores the language of the burglary statute and other statutes defining the phrases concerned, conflicts with holdings of the Florida Supreme Court, other district courts and the Second District, itself, and would inevitably lead to absurd results.

An examination of the material portion of the burglary statute reveals the following:

> 810.02 Burglary--
> (1) 'Burglary' means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in §775.082, §775.083, or §775.084, if, in the course of committing the offense, the offender.
> (a) Makes an assault or battery upon any person
> (b) is armed, or arms himself within such structure or conveyance with explosives or a dangerous weapon.
>
> F.S. §810.02 (1983).

Thus, the burglary statute of this state has expressly extended the meaning of "burglary" to cover ". . . remaining

in a structure. . ." as well as entering it. James v. State, 453 So.2d 786 (Fla. 1984), cert. denied, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984); Cf. Vasquez v. State, 350 So.2d 1094 (Fla. 3d DCA 1977)(reversed on other grounds), cert. denied, 360 So.2d 1094 (Fla. 1978). Thus, under the cited statute, evidence of unlawful entry is not even required for a burglary conviction. Routley v. State, 440 So.2d 1257 (Fla. 1983), cert. denied, 104 S.Ct. 3591, 82 L.Ed.2d 888 (1984). Indeed, even in jurisdictions in which the "remaining in" language has not been expressly set forth in the statute, a defendant who lawfully entered the premises but secreted himself and "remained in" the premises for the purpose of committing an offense therein has been held to have voided the consent to his entry and to be guilty of burglary. State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (N.C. 1979).

The "remaining in" analysis is particularly applicable to the facts in this case because they show that the petitioner, after obtaining unlawful entry (T. 15-16, 76), tried to leave the store and failed (T. 76). Then, while remaining in the premises, he armed himself with the loaded rifle and shotgun. (T. 20-22, 24, 76-77, 81-82). Thus, the reasoning, in an analysis of a similar situation, in People v. Walls, 85 Cal. App. 3d 447, 149 Cal.Rptr. 460 (Cal. 2d Dist. 1978) applies, as follows:

> To establish commission of a burglary the prosecution need only prove that one entered the premises with the intent to commit theft or a felony, and the crime is complete for that purpose, but this does not dictate the conclusion that the crime is complete for all purposes precluding consideration of the acts and conduct of the intruder after entry as part of the commission of the crime, or that the crime ends upon entry and cannot continue while he is unlawfully on the premises. We have been cited to no authority on this point but our courts have always recognized the concept that the burglary continues after entry with the requisite intent, is effected. In <u>People v. Caudillo</u>, 21 Cal.3d 562, 146 Cal.Rptr. 859, 580 P.2d 274, a rape was committed after entry to the apartment; although the Supreme Court found no great bodily injury to enhance the burglary sentence, the assumption that the sexual assault had been committed in the course of the commission of the burglary is clear. Likewise in <u>People v. Miller</u>, 18 Cal.3d 873, 135 Cal.Rptr. 654, 558 P.2d 552, a security guard was shot after entry of defendants to a jewelry store with intent to rob; the shooting was considered as committed in the course of commission of the burglary.

It is, therefore, clear that the defendant, who possessed the loaded rifle and shotgun while unlawfully remaining in the structure, possessed them during the commission of the crime for purposes of the mandatory minimum sentencing statute.

The petitioner's argument that he was not "in possession" of the rifle and shotgun (Appellant's Brief, 15-16) is fallacious

on its face where he admits that he grabbed the guns off the wall (Appellant's Brief, 6), and the loaded shotgun was found at his feet, as he was crouching while the rifle was found one (1) foot from his hands (T. 21).

Also, an absurd result is reached by the Pilcher reasoning. If the State does not present evidence of unlawful entry, which is unnecessary to a finding of burglary under Routley v. State, 440 So.2d 1257 (Fla. 1983), then a defendant who steals firearms has obviously possessed them while "remaining in" the structure and, therefore, would be properly sentenced under the minimum mandatory provisions. However, if evidence of unlawful entry, constituting additional damage to the structure, is presented, then the crime was complete upon entry and the perpetrator could not be sentenced to the minimum mandatory sentence for stealing firearms once he was inside. This is an obviously absurd result.

Further it is respectfully submitted that an act committed in the course of committing the offense is committed "at the time" the offense is committed, as the phrase was used by the appellant. (Appellant's Brief before the Third District, 13-14). We know, however, that an assault or battery committed inside the burglarized premises has been committed ". . . .in the course of committing the offense. . . ." within the meaning

of the First Degree Burglary Statute according to the Florida Supreme Court. F.S. §810.02 (2)(a); Brown v. State, 473 So.2d 1260 (Fla. 1985); Wicker v. State, 462 So.2d 461 (Fla. 1985); Wicker v. State, 445 So.2d 583 (Fla. 2d DCA 1983); Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1983). This has also been the position of every district court of appeals in the state that has confronted the issue, including the second district. Brlecic v. State, 456 So.2d 503 (Fla. 2d DCA 1984); Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1984); Monarca v. State, 412 So.2d 443 (Fla. 5th DCA 1982); see, Potts v. State, 403 So.2d 443 (Fla. 2d DCA 1981), aff'd, 430 So.2d 900 (Fla. 1982); McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980); receded from on other grounds, Speed v. State, 410 So.2d 980 (Fla. 2d DCA 1982). Since there is no practical distinction in this case between the phrases ". . . at the time of the burglary. . . ." as it was used in Appellant's Brief before the Third District (Appellant's Brief before the Third District, 14), ". . . during the commission of such felony. . ." as used in F.S. §775.087 and ". . . . in the course of committing the offense. . . ." as used in F.S. §810.02; the Pilcher analysis would also lead to a further absurd result. An assault or battery committed inside the burglarized premises, if they were illegally entered, could not be used to enhance the burglary to a first degree felony under F.S. §810.02 (2) because

it would not have been committed in the course of committing the offense, in clear contradiction to the cases cited above.

Petitioner's argument that different terminology must mean different things (Petitioner's Brief, 19-20) would be interesting if he presented any reasonable definition when a defendant must have ". . . in his possession a firearm. . . ." to be subject to enhancement under F.S. §775.087. However, he has not even attempted to do so, having realized that during the commission of a felony or in the course of committing the offense are the only reasonable answers, in which case the fallacy in the petitioner's argument becomes immediately obvious, pursuant to the analysis in this brief and in the opinion of the Third District (A).

The petitioner's argument, made for the first time before this Court, that the statute concerned was intended to prevent felons from arming themselves <u>prior</u> to a crime (Appellant's Brief, 18-19), instead of at or during the crime is clearly without support in any statutory definition in this state. Further, although petitioner talks about legislative history, he has been unable to refer to any item in the history of the act to support such a position. The argument must be rejected.

Further, statutes must be interpreted with other statutes with which they are in para materia pursuant to Goldstein v. Acme Concrete Corporation, 103 So.2d 202 (Fla. 1958) and subsequent cases. The Robbery Statute, two chapters beyond the burglary statute, provides a specific definition of what is meant by carrying a firearm in the commission of a robbery, as follows:

> 812.13 Robbery.--
>
> (1) 'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in §775.082, §775.083, or §775.084.
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084.
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.
> (3) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.
>
> F.S. §812.13

Thus, even where no firearm is possessed until the perpetrators are fleeing, the enhancement statute applies, as the Third District held in State v. Brown, 496 So.2d 194 (Fla. 3d DCA 1986). There is no reason that a distinction should be drawn between the phrases "at the time of the offense," "during the commission of such felony" and "in the course of committing the offense" as has previously been set forth. See, Peoples v. State, 436 So.2d 972 (Fla. 2d DCA 1983).

Therefore, for each of the above reasons, the evidence was sufficient to show that petitioner possessed a loaded rifle and shotgun during the commission of the burglary and the Third District should be affirmed on that ground, alone.

However, even if this were not the case, the evidence was sufficient to find that the petitioner possessed an automatic pistol during the commission of the burglary. Officer Russell testified that he had been trained in firearms identification and that he discovered, upon searching the petitioner immediately after the burglary, a .38 Smith and Wesson automatic in his pants pocket. (T. 41-42, 44-46). Although the jury found the petitioner not guilty of carrying a concealed firearm (R. 16), this could easily have resulted from the fact that Officer Russell never testified that the automatic was completely or even substantially concealed from

view in the petitioner's pocket (T. 31-48) as is required by F.S. §790.01 (1983). Padron-Canto v. State, 414 So.2d 1151 (Fla. 3d DCA 1982); Johnson v. State, 412 So.2d 391 (Fla. 3d DCA 1982); McGraw v. State, 404 So.2d 817 (Fla. 1st DCA 1981). The fact that the pistol was unloaded (T. 42) does not change its character as a "firearm" within the meaning of the minimum mandatory sentencing statute. F.S. §775.087 (2)(b)(1983); F.S. §790.001 (6)(1983); Bentley v. State, 477 So.2d 1087 (Fla. 4th DCA 1985); see, State v. Altman, 432 So.2d 159 (Fla. 3d DCA 1983); Machado v. State, 363 So.2d 1132 (Fla. 3d DCA 1978), cert. denied, 373 So.2d 459 (Fla. 1979); but see, Wilson v. State, 438 So.2d 108 (Fla. 1st DCA 1983). We know that the pistol, unlike the two long guns, was not stolen from the pawnshop because it was returned to its owner (T. 43, 47) and no handgun was returned to Mr. Burney, the pawnshop owner. (T. 70). Conflicts in evidence, differing inferences which may be drawn therefrom, and questions of credibility and weight to be given testimony will not establish insufficiency of the evidence. Wetherington v. State, 263 So.2d 294 (Fla. 3d DCA 1972). Therefore, evidence that the petitioner possessed a pistol during the commission of the burglary was sufficient to support the minimum mandatory sentence in this case. Indeed, it could easily have been reversible error for the trial court to do otherwise. State v. Sesler, 386 So.2d 293 (Fla. 2d DCA 1980).

Because evidence was sufficient to show that petitioner possessed a firearm during the commission of the burglary, the trial court did not reversibly err in imposing a three year minimum mandatory sentence in this case.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the opinion of the Third District Court of Appeal should clearly be affirmed.

Respectfully submitted,

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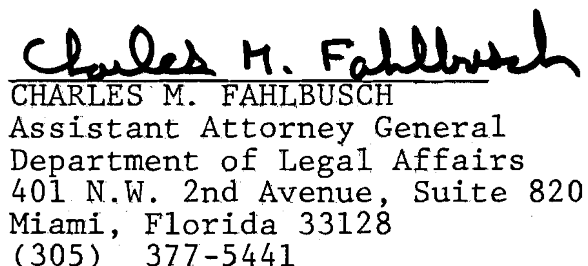

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to JAMES D. KEEGAN, ESQUIRE, Attorney for Petitioner, Special Assistant Public Defender, 1570 Madruga Avenue, Suite 214, Coral Gables, Florida 33146, on this 6th day of August, 1987.

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