OA 1-7-88

THE SUPREME COURT OF FLORIDA

CASE NO. 70,779

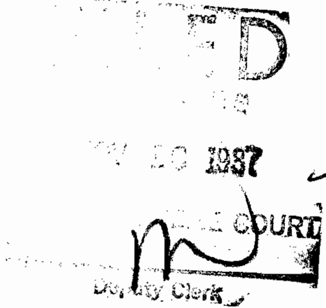
K.C. a juvenile,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

*

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

STEVEN T. SCOTT
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

Petitioner was the appellant in the Third District Court of Appeal, and respondent was appellee. The letter "R" will designate the record on appeal and "Tr" the transcripts of proceedings in the trial court.

STATEMENT OF THE CASE

Respondent accepts petitioner's version of this case's procedural history.

STATEMENT OF THE FACTS

On March 22, 1985, at approximately 9:00 a.m., K.C. and another juvenile, Eric Diaz, entered the Winn Dixie store at 1906 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida. (T. 4, 14). K.C., a fourteen year old juvenile, testified that he entered the store because his companion wanted to buy a ten pack of gum. (T. 58). K.C. was carrying a red gym bag, which he claimed he was carrying for his companion, when he entered the store. (T. 59-60).

K.C. testified to the following account of his activities in the Winn Dixie store: K.C. and Diaz proceeded

to the candy counter and when they arrived, Diaz asked for his wallet from the bag, (T. 58). Once K.C. opened the bag, Diaz started putting candy into the bag. (T. 58). K.C. asked Diaz, "Hey, what's going on? Put the candy back." (T. 58). K.C. observed the deli-manager, Ms. Rathburn, watching his activities, which prompted him to drop the bag. (T. 58). Diaz picked up the bag, put candy inside and Diaz, not K.C., zipped the bag closed. (T. 58-59). K.C. claims that he exited the store without handling any candy or gum. (T. 61).

Charles Fox, a bag boy employed by Winn Dixie, observed the juveniles enter the store and watched them proceed to the candy and gum aisle. (T. 14). Fox noted the arrival of the juveniles in the store with suspicion because of the time of the morning on a school day. (T. 5).

When the juveniles proceeded to the candy counter, they were observed loitering for quite a while by the Winn Dixie deli-manager Morene Rathburn. (T. 45). Ms. Rathburn was working at the salad case, about six to eight feet from the candy counter, and became suspicious because of K.C. and Diaz' activities. (T. 5, 8). Rathburn saw K.C. move the red gym bag in front of and in between the two boys, and saw

the bag opened. (T. 5). Although she could not see what went into the bag she did observe K.C. zipping the bag closed. (T. 6). After the bag was closed, she watched the boys go around the aisle and leave. (T. 6). Rathburn testified that as they were leaving she saw K.C. remove a ten-pack of gum from a hook, and on the way out of the store he threw the gum on the checkout counter. (T. 9). Rathburn followed K.C. and Diaz, and as they were leaving she called to the store manager, Michael Carrier, that the boys were stealing (T. 6). The store manager followed the boys down the aisle, through the register and out into the street. (T. 16).

K.C. and Diaz left the Winn Dixie and headed north on Ponce de Leon Boulevard. (T. 17). K.C. said that he ran from the store because he knew Diaz put candy in the bag and he was afraid of being caught and charged as an accomplice. (T. 60-61). K.C. testified that when he left the store he never heard anyone calling to stop and he was not aware anyone was chasing him. (T. 61).

Charles Fox, the bag boy, saw K.C. and Diaz running out of the store and he followed them into the street. (T. 16). The store manager was already outside the store when Fox arrived, and both men watched K.C. and Diaz running north on Ponce de Leon Boulevard. (T. 17, 34). Michael Carrier

and Charles Fox both testified that the store manager called for the fleeing juveniles to stop, the boys stopped, turned and looked at them, but then the boys continued to run. (T. 17, 35). Carrier and Fox began to chase K.C. and Diaz. Fox chased the boys for a number of blocks and finally cornered K.C. in a parking garage. (T. 20). Fox testified that after he apprehended K.C., K.C. said he was trying to catch the other guy (Diaz) and bring him back. (T. 20-21). Fox also testified that K.C. was running in front of Diaz for the majority of the chase. (T. 20).

Charles Fox brought K.C. and Diaz back to the store. (T. 21). While Fox was returning with the boys K.C. tried to get away from Fox by pulling his body away. (T. 21). After Fox brought K.C. and Diaz back to the store, he retrieved the red gym bag that Diaz dropped during the chase. (T. 21). When Fox opened the bag he saw books and packages of candy. (T. 22).

Officer Catherine Sours of the Coral Gables Police Department testified that she responded to a call from the Winn Dixie Store located on Ponce de Leon Boulevard. (T. 42). The dispatcher advised her there were two shoplifters in custody, and the store requested that a police officer come by. (T. 42). Officer Sours stated that when she

arrived K.C. and Diaz were in the custody of the Winn Dixie employees. (T. 43). Officer Sours inspected the red gym bag and saw numerous packages of candy inside. (T. 43)

SUMMARY OF THE ARGUMENT

Counts II and III of the petition for delinquency charging petitioner with resisting a merchant in violation of Florida Statute Section 812.015(6) (1985) were not defective for failure to disclose a material element of the offense. The omitted phrase from the statute, which requires a person to be subsequently convicted of retail theft in order to be convicted of resisting a merchant, is not a material element of the latter offense and its omission constitutes no error. The Third District's construction of the statute was both logical and proper. To say otherwise would be to ignore the plain intent of the Legislature. There was no error.

ARGUMENT

I

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNTS II AND III OF THE PETITION ALLEGING RESISTING A MERCHANT'S EFFORTS TO RECOVER THAT MERCHANDISE.

Petitioner contends that counts II and III of the Petition were fatally defective for failing to allege that he was "subsequently found guilty of theft of the subject merchandise" because this omitted phrase is a material element of the offense of resisting a merchant under §812.015(6), Florida Statutes. He relies upon the cases of In the Interest of W.L.B., 502 So.2d 50 (Fla. 1 DCA 1987), In the Interest of J.L.P., 490 So.2d 85 (Fla. 1 DCA 1986), and K.M.S. v. State, 402 So.2d 593 (Fla. 5 DCA 1981).

The Third District rejected the holdings of J.L.P. and K.M.S. in the instant case:

> "We also affirm the adjudication of delinquency for the two counts of resisting a merchant. The trial court's finding that the juvenile had committed the charged act of petit theft satisfied the requirement of section 812.051(6) that in order to be convicted for resisting a merchant, one must be found guilty of the underlying theft. We are not persuaded by appellant's argument on appeal that

> the motion for judgment of acquittal as to these counts should have been granted because the statute precludes the bringing of such charge until after a conviction for petit theft has been obtained. We recognize that two other district courts have taken this position. In the Interest of J.L.P., 490 So.2d 85 (Fla. 1st DCA 1986) (affirming delinquency adjudication based on theft of bicycle pump, but remanding for dismissal of charge of resisting a merchant, holding that the statute required a finding of guilt on the theft charge before a defendant could be charged with resisting arrest); K.M.S. v. State, 402 So.2d 593 (Fla. 5th DCA 1981) (failure of count charging juvenile with resisting a merchant to include element that juvenile was subsequently found to be guilty of theft of the subject merchandise entitled juvenile to granting of motion to dismiss)."
>
> 507 So.2d at 770

This Court, in Griffin v. State, 356 So.2d 297 (Fla. 1978) stated:

> In construing a statute, this Court is committed to the proposition that a statute should be construed and applied so as to give effect to the evident legislative intent, regardless of whether such construction varies from the statutes literal meaning.
>
> Id. at 299.

The intent of the legislature in enacting §812.015, Florida Statutes, relating to retail theft, is clear. As expressed by the court in Morris v. Albertsons, Inc., 705 F.2d 406, 410 (11th Cir. 1983), "the Florida Statute strikes a balance between a merchant's need for protection from the crime of shoplifting and the customer's legitimate interest in being free from groundless shoplifting accusations." The statute accomplishes this balance in a number of ways, such as requiring probable cause for detention.

With respect to the offense of resisting a merchant, as provided in §812.015(6), the legislature chose to give the customer an additional protection by ensuring that a customer wrongfully accused of retail theft and who, understandably, resisted the efforts of a merchant to detain him, could not be convicted of a crime for resisting such efforts. The legislature accomplished this by imposing a condition subsequent upon the crime of resisting a merchant.

This condition subsequent is analogous to the condition imposed under §812.025, Florida Statutes, where a single information may charge both theft and dealing in stolen property in connection with one scheme or course of conduct in separate counts, but the trier of fact may not return a

verdict of guilty on both counts. Under §812.015(6), the trier of fact is similarly restricted, but there it may return a verdict of guilty on the resisting charge only if it finds the defendant guilty of retail theft. But the fact that under §812.025 a conviction for theft removes the possibility of a contemporaneous conviction of dealing in stolen property cannot be said to elevate that fact into a material element of either the offense of theft or dealing in stolen property.

The elements of the offense of resisting a merchant are:

1. The defendant resisted the reasonable effort of a law enforcement officer, merchant, merchant's employee, or farmer to recover merchandise or farm produce.

2. The law enforcement officer, merchant, merchant's employee, or farmer had probable cause to believe the defendant had concealed or removed the merchandise or farm produce from its place of display or elsewhere.

3. The defendant knew or had reason to know that the person seeking to recover the merchandise or farm produce was a law enforcement officer, merchant, merchant's employee, or farmer.

These elements must exist at the time of the offense. Conversely, the condition subsequent discussed under this point on appeal cannot exist at the time of the offense. Moreover, it cannot even be known until the trier of fact renders its verdict on the retail theft charge.

To follow the decisions of the Court in K.M.S. and In the Interest of J.L.P., is to place the state in the following dilemma in those cases in which the state seeks to charge a person both of retail theft and of resisting a merchant arising out of the same incident: The state must either allege, together with the elements of the offense of resisting a merchant which existed at the time of the offense, a circumstance which it cannot know (the verdict on the retail theft charge), or prosecute the defendant in two separate trials or hearings. The former lacks both legal and logical support and the latter places an undue and unnecessary burden upon the judicial system.

The Third District's decision in the instant case was correct. Does anyone seriously believe that the Legislature intended two separate judicial proceedings in these cases? The answer is "no." All that is required is that the state prove the underlying crime of theft before a resisting a merchant charge can be sustained. To give the statute any other reading would be unwise, and completely unnecessary.

CONCLUSION

Based on the foregoing, the decision of the Third District should be upheld.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

STEVEN T. SCOTT
Assistant Attorney General
Department of Legal Affairs
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

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 HOWARD BLUMBERG, Assistant Public Defender, Public Defender's Office, 1351 N.W. 12th Street, Miami, Florida 33125, on this 13th day of November, 1987.

STEVEN T. SCOTT
Assistant Attorney General