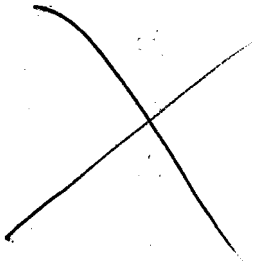


IN THE SUPREME COURT OF FLORIDA

RODNEY THOMAS,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 70,975
4th DCA No. 4-86-0800

FD
APR 1987
COURT
Deputy Clerk



RESPONDENT'S BRIEF IN OPPOSITION
TO JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

DEBORAH GULLER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

The Respondent was the appellant in the Fourth District Court of Appeal and the prosecution in the trial court. The Petitioner was the appellee and the defendant in the respective lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal

The symbol "R" will be used to refer to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Appellant "admitted entering the development by jumping a fence for the purpose of committing a burglary, but insisted he didn't". (Police Affidavit, Appellant's Brief at A-5).

Respondent accepts Petitioner's Statement of the Case and Facts on pages two (2) and three (3) of his brief to the extent they are not argumentative, with the noted correction.

POINT ON APPEAL

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL FOLLOWS THIS COURT'S OPINION IN FERGUSON v. STATE, 420 SO.2D 585 (FLA. 1982) AND THEREFORE DOES NOT DIRECTLY CONFLICT WITH ANOTHER DISTRICT COURT OF APPEAL?

SUMMARY OF THE ARGUMENT

The instant district court's opinion relies on this Court's decision and does not directly conflict with another district. The Second District Court of Appeal's opinion relied on by Appellant are in conflict with this Court.

ARGUMENT

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL FOLLOWS THIS COURT'S OPINION IN FERGUSON v. STATE, 420 SO.2D 585 (FLA. 1982) AND THEREFORE DOES NOT DIRECTLY CONFLICT WITH ANOTHER DISTRICT COURT OF APPEAL.

Citing to Preston v. State, 373 So.2d 451 (Fla. 2nd DCA 1979) and K.W. v. State, 468 So.2d 368 (Fla. 2nd DCA 1985), the Petitioner alleges that the instant decision in State v. Thomas, Case No. 4-86-0800, Opinion filed June 10, 1987, creates a conflict between the districts. Such is not the case. The Fourth District Court of Appeal relied on this Court's decision in Ferguson v. State, 420 So.2d 585, 587 (Fla. 1982).

Possession of a common household item can be illegal when the person possessing it has used it in committing a burglary or has the intent to use it in committing a burglary.

Id. at 587. The Opinion sub judice does not conflict with K.W. and Preston, but rather puts into proper perspective the opinion upon which those decisions were based, Foster v. State, 286 So.2d 549 (Fla. 1973).

The reasoning in Foster, therefore, can no longer be used to declare that separate convictions and sentences for burglary and possession of burglary tools are improper when the tools are common household items.

Ferguson at 587. Foster's holding that a common household item needs to be used as a burglary tool prior to a finding of illegality in the possession thereof was based upon a different set of facts and circumstances -- namely a single transaction

crime for which, originally, two sentences were imposed. Possession of burglary tools is not a lesser included offense of burglary and, therein the Fourth District Court of Appeal determined that possession of a household item is illegal when the intent to burglarize is present.

The opinion in K.W. v. State, relies on Preston, a case ruled on prior to Ferguson; further K.W. misstates the law¹ and does not reference this Court's opinion in Ferguson which, in actuality, controls. The Fourth District Court of Appeal followed Ferguson and therefore its opinion does not create the direct conflict.

Allegations of conflict are further negated by a closer look at the cases used in support of the alleged conflict.

Preston is not in conflict with the instant case:

Although the rule is generally stated elsewhere to be that an intent to use an item as a burglary tool can be found from surrounding circumstances in the absence of evidence of actual use of the item to commit a burglary, we have found no case in which the surrounding circumstances have been found sufficient to show an unlawful intent when the items in question were considered by the court to be common household tools, or tools of ordinary everyday use.

Id. at 454. The case sub judice is a case wherein the "surrounding circumstances ... show an unlawful intent." Id. The

¹"[I]t is necessary for the state to present evidence of an item's actual use in burglary or attempted burglary to establish the requisite criminal intent." K.W. at 369, referencing Preston. Clearly this is in conflict with Ferguson.

report of the confidential informer, which actually named the Appellant as the burglar, (Appellant's Brief at A-5), along with the other facts alleged are such circumstances. K.W., a child v. State, 468 So.2d 368 (Fla. 2nd DCA 1985) is not in conflict with the case sub judice in that therein the State "presented no evidence that the items were not 'innocent items.'" In the instant case the intent of the Appellee is clear, providing evidence that the screwdriver was not an "innocent item."

Lastly, the Petitioner gives this alleged conflict the imprimatur of importance by referencing to the Florida Standard Jury Instructions, at page 138. His reference however does not include the Definition:

Any [tool] [machine] [implement] may be a burglary tool depending upon its [use] [intended use].

Id. (emphasis added).

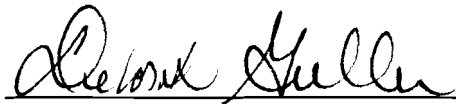
The Respondent respectfully requests this Court to deny "conflict" jurisdiction as there is no conflict between the districts; and if there is, the conflict is between this Court's decision in Ferguson and the Second District Court of Appeal's opinion in K.W., and not with the instant case.

CONCLUSION

Based upon the foregoing argument, supported by the circumstances and authorities therein, Respondent would respectfully request that this Honorable Court deny jurisdiction over the instant cause.

Respectfully submitted

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

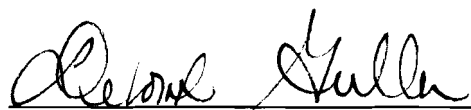


DEBORAH GULLER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief in Opposition to Jurisdiction has been furnished by mail/courier to JEFFREY L. ANDERSON, Assistant Public Defender, 9th Floor Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401 this 28th day of August, 1987.



Of Counsel