

DA 5-2588

IN THE SUPREME COURT OF FLORIDA

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

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CASE NO. 70,975

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4-8
THE TRIAL COURT ERRED IN DISMISSING THE CHARGE OF POSSESSION OF A BURGLARY TOOL.	
CONCLUSION	9
CERTIFICATE OF SERVICE	9

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Broughton v. State,</u> 12 F.L.W. 2137 (Fla. 1st DCA September 3, 1987)	5
<u>Crosby v. State,</u> 352 So.2d 1247 (Fla. 2nd DCA 1977)	6
<u>Ferguson v. State,</u> 420 So.2d 585 (Fla. 1982)	5,7
<u>Foster v. State,</u> 286 So.2d 549 (Fla. 1973)	6,8
<u>Hubbell v. State,</u> 446 So.2d 175 (Fla. 5th DCA 1984)	7,8
<u>James v. State,</u> 452 So.2d 1048 (Fla. 2nd DCA 1984)	7
<u>Jones v. State,</u> 192 So.2d 285, 286 (Fla. 3rd DCA 1966)	8
<u>K.W. v. State,</u> 468 So.2d 368 (Fla. 2nd DCA 1985)	7
<u>Preston v. State,</u> 373 So.2d 451 (Fla. 2nd DCA 1979)	6,7
<u>State v. Thomas,</u> 508 So.2d 1287, 1288 1289 (Fla. 4th DCA 1987)	4,6,8
<u>State v. Thomas</u> 362 So.2d 1348 (Fla. 1978)	5,6

<u>STATUTE</u>	<u>PAGE</u>
<u>Fla. Stat.,</u> §810.06	3

OTHER AUTHORITY

<u>Florida Standard Jury Instructions,</u> page 138	8
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PRELIMINARY STATEMENT

The Respondent was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal. The Petitioner was the defendant and the Appellee in the courts below. The parties will be referred to, in the instant brief, as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented on pages two (2) through three (3) of Petitioner's Brief on the Merits.

SUMMARY OF THE ARGUMENT

The trial court improperly dismissed the Possession of Burglary Tools charge. The Petitioner admitted he intended to burglarize the neighborhood and the surrounding circumstances indicate an intent to use the screwdriver to facilitate said intent. A crime, pursuant to §810.06, Fla. Stat. was committed. This Court's precedent requires affirmation of the appellate decision below.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE  
CHARGE OF POSSESSION OF A BURGLARY TOOL.

Petitioner references the trial court's requirement, pursuant to precedent, that "a nexus [is required] between the possession of that particular type of article and a crime in which it was used in some manner or it was obvious that it would be used in some manner . . . " (R. 7, Petitioner's brief at 9) (emphasis added). Petitioner admitted that he had intended to commit a burglary when he entered the residential development,<sup>1</sup> but had not done so prior to his arrest. (Petitioner's brief at 2). A nexus is clearly present given Petitioner's admitted intent and his actual possession of burglary tools. Given the admission, a circumstance singular to the instant case, actual use, as alleged by Petitioner, is not required. Petitioner wanted to commit a crime; he does not allege that he changed his mind or otherwise determined that it would be best not to commit an illegal act. He was merely thwarted by the officer's presence upon the scene. He was found with socks on his hands (R. 8), jumping over a fence and he attempted to run away. State v. Thomas, 508 So.2d 1287, 1288 (Fla. 4th DCA 1987).

The Fourth District Court of Appeal reversed the trial court's dismissal of the possession of burglary tools charge

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<sup>1</sup> Petitioner was caught climbing over the protective fence at 12:30 a.m. (R. 8).

based on this Court's opinion in Ferguson v. State, 420 So.2d 585 (Fla. 1982), wherein it was held that intent, in addition to actual use, was sufficient to uphold a possession of burglary tools charge when the tool is a common household item. This Court emphasized intent.

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. §810.06.

Ferguson at 587. Ferguson is still good law; accordingly, Petitioner's referenced cases subsequent to the decision are in conflict, were erroneously determined and this Court should clearly indicate as much sub judice, or confine the holdings to the facts of each case.

In Broughton v. State, 12 F.L.W. 2137 (Fla. 1st DCA September 3, 1987) the court, without reference to Ferguson, quoted this Court's opinion in State v. Thomas 362 So.2d 1348 (Fla. 1978) wherein it was held that "[p]ossession of otherwise 'innocent' items coupled with the use or intended use of such tools in a burglary, is unlawful." Thomas at 1350. Broughton applying that law to the circumstances presented, found the "evidence insufficient to establish a prima facie case of possession burglary tools." Broughton at 2138. The law pursuant to Thomas and Ferguson, applied to the facts of the case at bar--admitted intent to commit burglary--requires affirmation of the

District Court's opinion. The undisputed facts do present a prima facie case of possession of burglary tools.

Preston v. State, 373 So.2d 451 (Fla. 2nd DCA 1979) is likewise inapposite. That defendant admitted to night prowling. Id. at 452. Additionally, contrary to the facts at bar, the court in Preston states "[i]n the neighborhood in which appellant was apprehended, on the night in question, no burglaries or attempted burglaries were reported or known to have taken place." Id. at 453. Sub judice, the Fourth District's opinion states that the officers were surveilling the development "where several burglaries had taken place . . . ." State v. Thomas, 508 So.2d at 1288.

Preston strains to affirm its own prior decision in Crosby v. State, 352 So.2d 1247 (Fla. 2nd DCA 1977) in which the court erroneously relied on Foster v. State, 286 So.2d 549 (Fla. 1973). The statutory basis of Foster has since been amended, not, as stated in Preston, to eliminate "unnecessary verbiage", but rather to broaden the scope of the proscribed crime. Preston relies on Foster and cases elsewhere, yet acknowledges:

[a]lthough 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 . . . .

Preston at 454, (emphasis added). Preston was decided nine years ago. The instant case clearly presents circumstances where the admitted intent to commit burglary implies intent to use the screwdriver as a burglary tool. The Petitioner was in actual possession of the screwdriver. Preston states, in support of its above cited conclusion that "the Courts found that the circumstances were not sufficient to support a finding of burglarious intent." Id. Sub judice, "burglarious intent" was admitted. Every facit of Preston requires a differing result by this Court.

The Second District further bolsters its opinion in K.W. v. State, 468 So.2d 368 (Fla. 2nd DCA 1985), a case subsequent to Ferguson. In K.W. the facts, again, are distinguishable, in addition to the court's wrongful application, or omission to apply, the law. K.W. does not have admission of an admitted intent to burglarize. Further, Respondent posits that those circumstances demonstrated intent. In James v. State, 452 So.2d 1048 (Fla. 2nd DCA 1984), the opinion does not supply the factual circumstances upon which to state "there is no evidence for a jury to reasonably infer, rather than wildly speculate, that a defendant had the intent to use the common household item to perpetrate a burglary." (Petitioner's brief at 10). Petitioner's reliance on Hubbell v. State, 446 So.2d 175 (Fla. 5th DCA 1984) in support of the above quoted proposition, is misapplied. In Hubbell, the "otherwise innocent" item was a

pipe found around Hubbell's feet. Id. at 176. He was not in actual possession. Sub judice, Petitioner was in actual possession. As noted in Hubbell, the "conviction for possession of burglary tools was upheld [in] Foster v. State, 286 So.2d 549 (Fla. 1973). Id.

Petitioner's reference to the Florida Standard Jury Instructions, at page 138 does not add credence or viability to his position. Petitioner was in actual possession of the screwdriver and intended to burglarize, the circumstances clearly indicate that his intent to burglarize encompassed the intent to use the screwdriver to facilitate the burglary. "Since intent may be proved by circumstantial evidence, Jones v. State, 192 So.2d 285, 286 (Fla. 3rd DCA 1966) (and here there is also the incriminating statement), there was sufficient evidence to establish a prima facie case." State v. Thomas, 408 So.2d at 1289.

Respondent respectfully submits that Petitioner's concern for judicial economy,<sup>2</sup> is misplaced sub judice, because the law is clear that the trial court erroneously granted the motion to dismiss, that the Fourth District Court of Appeal properly applied the law and accordingly, that decision must be affirmed. A remand for trial is required.

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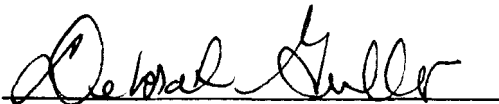
<sup>2</sup> Petitioner's brief at 11 note 5.

CONCLUSION

Based on the foregoing reasons and citations of authority, the Respondent respectfully submits that the judgment and sentence of the Fourth District Court of Appeal should be affirmed.

Respectfully submitted,

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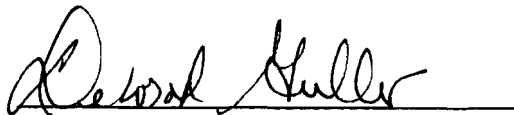


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by mail/courier to JEFFREY L. ANDERSON, Assistant Public Defender, The Governmental Center/9th Floor, 301 N. Olive Avenue, West Palm Beach, Florida 33401 this 16<sup>th</sup> day of March, 1988.



Of Counsel