

071 5-25-00  
**IN THE SUPREME COURT OF FLORIDA**

APR 6 1990

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RODNEY THOMAS,

Petitioner,

vs.

CASE NO. 70,975

STATE OF FLORIDA,

Respondent.

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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PRELIMINARY STATEMENT

The Petitioner was the appellee in the court below and the defendant in the trial court. Respondent was the appellant in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief and designated (Appendix).

The following symbols will be used:

"R"	Record on Appeal
"A"	Appendix

ARGUMENT

POINT INVOLVED

THE TRIAL COURT DID NOT ERR IN GRANTING THE  
MOTION TO DISMISS THE CHARGE OF POSSESSION OF A  
BURGLARY TOOL.

In its brief Respondent argues that Petitioner's intent to commit a burglary<sup>1</sup> combined with the possession of a common household item is evidence capable of supporting a verdict that the common item is a burglary tool. However, it would at best be pure speculation to conclude, because a person had intended to commit a burglary, that any common household item<sup>2</sup> found on his person constituted a burglary tool. Again, such evidence alone is not capable of supporting a verdict by a reasonable jury that the item is a burglary tool.

Respondent relies on Ferguson v. State, 420 So.2d 585 (Fla. 1985) to imply that this Court has reversed its position in Foster v. State, 286 So.2d 549 (Fla. 1973) that one cannot be convicted of possession of burglary tools when the tool is nothing more than a screwdriver without the use of such a tool in a burglary. However, the decision in Ferguson only recedes from the reasoning in Foster to the extent that a conviction for burglary does not bar a conviction for possession of burglary tools due to the "single transaction rule":

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<sup>1</sup> Respondent also argues for the first time on appeal that Petitioner was thwarted by officers from committing a burglary. However, the undisputed facts showed that Petitioner had already voluntarily left the area, by climbing over the fence, without committing any burglary.

<sup>2</sup> Such as a screwdriver, comb, driver's license, credit cards, nailfiles, etc.

In Borges, we directly construed the application of section 775.021(4), and we found that the "statute has abrogated the single transaction rule." 415 So.2d at 1266. 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.

420 So.2d at 587.

Ferguson does not recede from the proposition in Foster that the intent to use a common household item in a burglary can only be shown by its actual use in a burglary, or by its use in an attempted burglary.<sup>3</sup> In fact, in Ferguson this Court recognized the validity of the Foster decision's limitation on the definition of a burglary tool, by limiting its holding to indicate that Foster no longer controlled the double jeopardy issue due to the recent abrogation of the single transaction rule:

In finding that the possession charge was a lesser included offense of burglary, the court in Humphreys relied on our decision in Foster v. State, 286 So.2d 549 (Fla. 1973), 388 So.2d at 607, n.1. In Foster, we found that, because the burglary tool at issue was a screwdriver, convictions and sentences for both burglary and possession of burglary tools were improper. We did not, however, base our holding on a determination that possession of burglary tools was a lesser included offense of burglary in circumstances where the tool was a common household item. Rather, we found that possession of a common household item is illegal only when it

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<sup>3</sup> Because intent to use a tool in a burglary can be proven by the use of the tool in an attempted burglary, the statement in Ferguson that a common 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" is consistent with Foster without the language intent to use it in committing a burglary being redundant.

is used as a burglary tool and that, in these circumstances, possession of burglary tools was simply a facet of the criminal transaction of burglary and so could not support a separate conviction and sentence.

420 So.2d at 587.

Respondent's attempt to distinguish Preston v. State, 373 So.2d 451 (Fla. 2d DCA 1979), on the ground that in Preston no burglaries had occurred on the night that the defendant was arrested, is without merit. Like Preston, in the instant case there was no evidence that any burglary, or attempted burglary, had been committed on the night in question (R12).

Petitioner is not arguing that intent to use an item as a burglary tool can not be proven through circumstantial evidence. However, Petitioner is maintaining that the circumstantial evidence must show that the common item was used in a burglary, or attempted burglary, in order to prove the requisite intent. For example, Respondent notes that the conviction for possession of burglary tools was upheld in Foster, supra.<sup>4</sup> In Foster there was circumstantial evidence showing use of the screwdriver in the burglary where the screwdriver had blue paint from the point of entry. Thus, the circumstantial proof of use of the screwdriver in the burglary was sufficient for conviction. At bar there is no circumstantial proof that Petitioner had used the screwdriver in a burglary or an attempted burglary. Thus, there is no evidence that Petitioner intended to use the common item in a burglary.

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<sup>4</sup> The sentence was actually reversed on Double Jeopardy grounds.


Finally, the crux of the argument is whether the common household items in one's possession can be classified as burglary tools merely based on possession combined with an independent intent to commit a burglary. The possession of a common household item, combined with the intent to commit a burglary, does not yield a rational inference that the item was intended to be used to commit a burglary. Even burglars innocently carry common household items without intending to use them in a burglary. The automatic illegalization of every common household item possessed by a potential burglar can not be based on mere speculation of the possibility that the potential burglar may have intended to use the item in a burglary. At bar it cannot be said that the trial court erred in determining that a reasonable jury could only speculate from the set of undisputed facts that there was an intent to use the common household item in Petitioner's possession as a burglary tool. Petitioner relies on his initial brief on the merits for further argument on this point.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable Court to quash the decision of the district court.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DEBORAH GULLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 4th day of April, 1988.

  
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