

IN THE SUPREME COURT OF FLORIDA

WILLIAM AUSTIN,

Petitioner,

v.

CASE NO. **SC03-1416**

STATE OF FLORIDA,

Respondent.

_____ /

JURISDICTIONAL BRIEF OF PETITIONER

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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STATE OF FLORIDA,
Appellee.:

JURISDICTIONAL BRIEF OF PETITIONER

I STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal. Austin v. State, 849 So.2d 376 (Fla. 1st DCA 2003), rehearing denied July 15, 2003.

Petitioner, William Austin, was convicted of robbery for stealing a woman's purse. He was stopped within a few minutes of the robbery; he was found in possession of cash in certain denominations, which matched the amount and denominations reported stolen. At the scene, he gave the arresting officer an exculpatory explanation for his possession of the cash.

On appeal, he argued "suppressing the statement violated due process because the court then instructed the jury that it could infer guilt from the unexplained possession of recently stolen property when, in fact, there was an explanation." Id.

The First District Court rejected this argument:

We need not reach the merits of Appellant's argument because the suppressed statement did not attempt to explain possession of the victim's recently stolen currency. Instead, it was a statement that the currency found in his possession was not the currency that was recently stolen. The victim's purse was stolen just minutes before Appellant gave his statement to the arresting officer. Thus, if the currency found in Appellant's possession was the same as the currency stolen from the victim just minutes before, Appellant could not have obtained it earlier that day when he cashed his paycheck. Because the statement was a denial that the currency was stolen, it could not be offered to explain why Appellant possessed recently stolen currency.

849 So.2d at 376-77.

II SUMMARY OF ARGUMENT

The issue is whether the trial court can exclude the defendant's explanation because it is "self-serving" hearsay, but at the same time instruct the jury it can infer guilt from "unexplained" possession of recently stolen property. The First District Court of Appeal declined to reach the issue because Austin's explanation denied that the cash in his possession was the cash stolen.

The lower court opinion misapprehended the law, and conflicts with other cases, on the questions of 1) whether a jury instruction error may be rejected on appeal because the defense theory of the case does not support the instruction, but the state's theory does support it, 2) whether the defendant's explanation can be excluded when the jury is

instructed to infer guilt from unexplained possession, and 3) the state's predicate burden of proof for giving an instruction on possession of recently stolen property, where the property is fungible, and due to fungibility, the state fails to prove conclusively that the property found is the property stolen.

The district court rejected Austin's complaint about the jury instruction because he testified that the cash he had was not the cash stolen. Following the court's own reasoning, if Austin's testimony were the dispositive factor, then the cash was not stolen property, and it was error to give **any** instruction that presumes the property was stolen. Or, since the jury was instructed to infer guilt from unexplained possession, then it was error to exclude the explanation. Although Austin denied it, the **state's** theory was that the cash he had **was** the cash stolen, thus justifying the instruction, contrary to the district court's opinion.

Further, the instruction is proper only when the state proves "indisputably" that the property was stolen. Unless the property is indisputably stolen, instructing the jury to presume it is stolen goes against the presumption of innocence. Jones, infra. When fungible property (cash) is stolen, the state has to prove that the property found is in fact the property stolen, which it failed to do in this case.

The court cited no case that supports its opinion on any of

these points, and the decision is in express and direct conflict with Consalvo and Jones, infra, on all these points.

III ARGUMENT

ISSUE PRESENTED

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN CONSALVO V. STATE AND THE DECISION OF THE FOURTH DISTRICT COURT IN JONES V. STATE, INFRA, ON WHETHER IT WAS PROPER TO INSTRUCT THE JURY ON POSSESSION OF RECENTLY STOLEN PROPERTY.

The question is whether the trial court can exclude the defendant's explanation because it is "self-serving" hearsay, but at the same time instruct the jury it can infer guilt from his "unexplained" possession of recently stolen property. Petitioner, William Austin, argued it denied him due process for the court to exclude his explanation, then instruct the jury it could infer guilt because he gave no explanation.

In rejecting his claim, the district court's ruling conflicts with other cases from this court and another district court. The court's greatest misapprehension is that it would deny a defendant due process in the jury instructions because his theory of the case is different from the state's theory.

The district court ruled that a defendant cannot complain about an error in a jury instruction which supports the state's theory of the case, because his own theory of the case disputed the state's theory. This is an incorrect statement of the law and could cause confusion in jury instructions far beyond the facts of this case. Thus, this court should accept the case for review.

The First District held it need not reach the question

because Austin's explanation was that he had cashed a paycheck earlier that day. Thus, the cash in his possession was not the cash which was stolen. Following this reasoning, if Austin's denial were the dispositive factor, then the cash he had was not stolen, and it was error to give **any** instruction that the jury was to presume it was the cash stolen. Thus, according to its own reasoning, the district court should have held that giving the instruction was error, but it did not. The district court's ruling was in error, and in conflict with other cases.

The court's reasoning went awry for several reasons: First, although Austin denied it, the **state's** theory was that the cash he had **was** the cash stolen, thus the instruction was justified by the state's theory of the case, and the district court's ruling is in error. Second, as argued above, according to the district court's reasoning, if the cash Austin had was not the cash stolen, then it was error to give any instruction that guilt may be inferred from unexplained possession. But if it was proper to instruct the jury that unexplained possession infers guilt, then it was error to exclude the explanation.

Third, the instruction is proper only when the state proves "indisputably" that the property was stolen. Unless the property is indisputably stolen, telling the jury it may presume guilt from mere possession goes against the presumption

of innocence. Jones v. State, 495 So.2d 856 (Fla. 4th DCA 1986). When fungible property - such as cash - is stolen, the state may be unable to prove that the property found is in fact the property stolen. If the state fails to prove this beyond a reasonable doubt, it is error to give the instruction because the instruction presumes this fact was proved.

In the seminal case, this court held that this inference is so strong that it can alone sustain conviction:

. . .the inference that the possessor is the guilty taker is so strong that the rules of evidence permit the jury to return a verdict of guilty on this one circumstance alone if the defendant allows it to go to the jury. . .unexplained. . .

State v. Young, 217 So.2d 567, 571 (Fla. 1968), cert. denied, 96 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969).

However, there are predicate factual requirements, which the state failed to prove in the instant case:

As with all jury instructions, there must be an appropriate factual basis in the record in order to give this instruction. See, e.g., Griffin v. State, 370 So.2d 860, 861 (Fla. 1st DCA 1979)(holding that in prosecution for burglary it was reversible error to give instruction regarding possession of stolen property when evidence did not disclose that defendant was ever in possession of the property). This means two things. **First, it must be shown that the defendant, when arrested, either failed to explain or gave an incredible or unbelievable explanation for his possession of the property. Id. Second, the instruction applies only where the property is undisputedly stolen** and the question is who stole it. See Jones v. State, [infra], [495 So.2d at 857]. "[W]here there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken . . . the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from . . . the testimony."

Curington v. State, 80 Fla. 494, 497, 86 So. 344, 345 (1920). It is improper to give this instruction when its only possible effect is to allow the jury to presume that a defendant is guilty because he was in possession of the property. This goes against the presumption of innocence inherent in our criminal justice system. Jones, 495 So.2d at 856. (emphasis added)

Consalvo v. State, 697 So.2d 805, 815 (Fla. 1996).

In Jones, supra, the defendant claimed he had possession of a car pursuant to a purchase agreement with a used car dealer, and he had left his truck with the dealer as part of the deal. The dealer claimed he consented to the car being taken only for a test drive, and no purchase agreement had been finalized. The dealer did not report the car stolen until eight days later. The district court said:

The only issue at trial was whether Jones intended to steal the car or took it innocently, in other words, whether the car was stolen. **The challenged jury instruction, however, states as a fact that the pro-property was stolen and establishes the presumption that the person in possession was the thief.** Such an instruction serves no purpose in a case such as this. "[W]here there is conflict in the evidence as to the intent with which property alleged to have been stolen was taken ... the question should be submitted to the jury without any intimation from the trial court as to the force of presumptions of fact arising from ... the testimony." Curington v. State, 80 Fla. 494, 86 So. 344, 345 (1920). Under the instruction, before the jury could make the presumption, it would have to find that the property was stolen. If the jury found that the car was stolen, however, it would find Jones guilty and the case would be resolved. In other words, there would then be no need for the pre-sumption. **The presumption applies in a different type of case, that is, where the property is undisputably stolen and the question is who stole it.** The only possible effect of the instruction here was to allow the jury to presume Jones was guilty because he was in possession of the car. This goes against the presumption of innocence inherent in our criminal justice

system. Curington. (emphasis added)

495 So.2d at 857.

Nor does the presumption apply in the instant case. The issue here is whether the cash in Austin's possession was the cash stolen. Currency is fungible, and the evidence was disputed as to whether the cash found and the cash stolen were one and the same. Thus, this is not a case "where the property is undisputably stolen." Under Jones, the instruction should not be given when there is a factual dispute as to whether the property is stolen, because the instruction presumes the property is stolen.

The instruction is not appropriate when the question is whether the property was stolen or taken innocently - as in Jones. It is also inappropriate where - as here - property was indisputably stolen, but the state failed to prove the fungible property in the defendant's possession was indisputably the same property which was stolen. Thus, the district court's decision is in express and direct conflict with Consalvo and Jones, on all these points.

This instant opinion also said:

Appellant concedes the statement was self-serving hearsay and that the rule of completeness does not apply.

Austin, supra.

Perhaps, but, the court overstated petitioner's "concession." All exculpatory explanations could be classified as

self-serving hearsay, yet they are admissible despite their "self-servingness" because the instruction tells the jury it can infer guilt from possession unless it is satisfactorily explained. While counsel "conceded" that Austin's statement was self-serving, counsel argued it was error to exclude the statement. See Duncan v. State, 616 So.2d 140 (Fla. 1st DCA 1993)(defendant's testimony as to the reason given by the person who sold him the property for a low price was relevant **nonhearsay** offered to overcome the presumption of guilty knowledge arising from possession of recently stolen property).

In a typical case, the jury is not instructed that it may infer guilt from the defendant's failure to explain. In fact, the jury is instructed that it may infer nothing from the defendant's silence; thus in a typical case, a self-serving statement may be excluded. Where the jury is instructed that guilt can be inferred from not explaining, then the explanation cannot be excluded.

The rule of completeness does not literally apply because of its technical requirements, but counsel argued that the principle of the rule - that the state not be allowed to mislead the jury by excluding part of a statement - applies to Austin's situation. In excluding his explanation and yet instructing the jury it could infer guilt from giving no explanation, the jury was misled.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order brief-ing on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Anne C. Toolan, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to Mr. William Austin, inmate no. 797447, Century Work Camp, 400 Tedder Road, Century, FL 32535, this _____ day of August, 2003.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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