

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

5th DCA Case No. 5D04-2422

v.

Supreme Court Case No.

STEPHAN KENT STUCKEY,

Respondent.

_____ /

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The Fifth District Court of Appeal's opinion in Stuckey v. State, 30 Fla. L. Weekly D1529 (Fla. 5th DCA June 17, 2005), stated:

The appellant, Stephen K. Stuckey and his codefendant were arrested by members of the Sam's Club Loss Prevention Team. Mr. Stuckey and the codefendant were observed while in a Sam's Club store shoving DVDs into the waist bands of their pants. As the two men tried to exit the store, they were confronted by the Sam's Club employees. While the codefendant did not struggle, Mr. Stuckey attempted to flee. He was eventually taken down and handcuffed by the loss prevention team, which then recovered DVDs on him valued at \$ 241.02.

The information filed by the State charging him with robbery alleged that Mr. Stuckey:

Did take money or other property, from the person or custody of another, Chris Meade or Robert Becker, with the intent to permanently or temporarily deprive said person of said property, and in the course of the taking did use force, violence, assault, or putting in fear, and further, Stephen Kent Stuckey had previously been convicted two or more times of theft, to-wit: grand theft in case no. 82-4234-BB, grand theft in case no. 84-2596-CC, grand theft in case no. 84-3375-CC, in Volusia County, contrary to Sections 812.13(1) and 812.13(2)(c), 812.014(3)(c), Florida Statutes.

Chris Meade and Robert Becker, the persons who were listed as the victims of the robbery, were actually the employees of Sam's Club who captured Mr. Stuckey.

At trial, the State called three witnesses. Each of the witnesses attested that they saw or participated in Mr. Stuckey's apprehension outside of Sam's Club. The defense called no witnesses on its own behalf. Mr. Stuckey moved for a judgment of acquittal with respect to robbery because of the purported failure of the State to show that the property taken was under the actual control of the victim. The motion was denied. At the conclusion of the case Mr. Stuckey requested that the jury be given instructions on the lesser included offenses of petty theft, battery and resisting a merchant.

The State argued that since the information did not allege the victim to be a retail establishment, and did not allege that the items taken were merchandise, the permissive lesser included instruction of resisting a merchant was not available to Mr. Stuckey. Mr. Stuckey responded that he was entitled to an instruction on resisting a merchant despite the fact that the State did not allege either a merchant or merchandise in the information. He argued in particular that the evidence and testimony showed quite certainly that the items stolen - the DVDs - were merchandise, and that they were taken from Sam's Club - a merchant. The trial court gave the instructions for battery and petit theft, but denied the request for an instruction on resisting a merchant.

The jury returned a verdict finding Mr. Stuckey guilty as charged of robbery. After the trial court made findings that Mr.

Stuckey was a prison releasee reoffender, and a violent career criminal, it sentenced him to a mandatory minimum term of thirty years incarceration in the custody of the Department of Corrections as a violent career criminal, and fifteen years in prison, day for day, as a prison releasee reoffender.

Id.

SUMMARY OF ARGUMENT

This Court should accept jurisdiction in the instant case. On the face of the decision under review, there is express and direct conflict with many cases including Brown v. State, 206 So. 2d 377, 383 (Fla. 1968), overruled in part by In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594 (Fla. 1981), and State v. Wimberly, 498 So. 2d 929, 931 (Fla. 1986) and their progeny; as well as State v. Bloom, 497 So. 2d 2 (Fla. 1986) and State v. Abreau, 363 So. 2d 1063 (Fla. 1978).

ARGUMENT

THERE IS EXPRESS AND DIRECT
CONFLICT ON THE FACE OF THE
DECISION IN STUCKEY v. STATE,
INFRA, WITH DECISIONS OF THIS
COURT AND OF OTHER DISTRICT COURTS
OF APPEAL. THIS COURT SHOULD
THEREFORE ACCEPT JURISDICTION.

On June 17, 2005,¹ the Fifth District Court of Appeal issued an opinion in this cause reversing for a new trial because the trial judge refused to give an instruction on a permissive lesser included offense. Appellant/Respondent (hereinafter Respondent) was charged with robbery and had requested an instruction on the permissive lesser included offense of resisting the efforts of a merchant. The trial court refused because the language of the information did not support the permissive lesser instruction, but did give the necessarily lesser included instruction on petit theft as well as the permissive lesser charge on battery. The jury convicted Appellant as charged of robbery.

On appeal, Respondent claimed error on the basis that he had been entitled to the instruction on resisting the efforts of a merchant regardless of the language of the information. In its

¹Petitioner filed a motion for rehearing/rehearing en banc which was denied by the Fifth District Court of Appeal on August

Stuckey opinion, the Fifth District Court of Appeal agreed with Respondent. Infra. While noting that the information did not identify either the owner of the store as a victim or that merchandise was taken, the Fifth District Court of Appeal expressed outrage at the drafting of the information by the executive branch and concluded that the State's "imaginative" drafting had offended their collective sense of fairness since the State had "subverted" the defendant's right to present a defense. Infra. Thus, the Fifth District Court of Appeal confirmed that the accusatory pleading did not *prima facie* support the giving of the lesser instruction, but made an exception for circumstances wherein the court's collective sense of fairness was offended.

The Stuckey opinion directly and expressly conflicts² with the long established rule in Florida that an instruction cannot be given on a permissive lesser included offense unless both the accusatory pleading and the evidence support the commission of that offense. Brown v. State, 206 So. 2d 377, 383 (Fla. 1968),

5, 2005.

²Article V, Section 3(b)(3) provides that the Florida Supreme Court may review a district court of appeal decision only if it "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."

overruled in part by In re Use by Trial Courts of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594 (Fla. 1981) and State v. Wimberly, 498 So. 2d 929, 931 (Fla. 1986) ("whether a charge of the lesser crimes under category 2 is necessary will require the trial judge to analyze the information or indictment and the proof to determine if elements of category 2 crimes may have been alleged and proved.")(quoting Fla. Std. Jury Instr. (Crim.) Notes (2d ed.)); see also State v. Daophin, 533 So. 2d 761, 762 (Fla. 1988) ("In order to be entitled to instructions on category two offenses, both the accusatory pleadings and the evidence must support the commission of the permissive lesser included offense."); State v. Von Deck, 607 So. 2d 1388, 1389 (Fla. 1992)("an instruction cannot be given on a permissive lesser included offense unless both the accusatory pleading and the evidence support the commission of that offense"); Cave v. State, 613 So. 2d 454 (Fla. 1993)(Florida law requires that a permissive lesser offense be described not only in the evidence but also in the accusatory pleadings before a defendant is entitled to an instruction on that offense); Welsh v. State, 850 So. 2d 467, 468, n.2 (Fla. 2003)(in order for a defendant to be entitled to an instruction on a permissive lesser offense, "the indictment must allege all of the statutory elements of the

permissive lesser included offense, and there must be some evidence adduced at trial establishing all of the elements of the permissive lesser.")³

Moreover, the Fifth District Court of Appeal's attempt to rationalize its exception to the Brown/Wimberly rule based upon its criticism of the manner in which the State charged Respondent also conflicts with another decision of this Court. In State v. Bloom, 497 So. 2d 2 (Fla. 1986), this Court affirmed the exclusive authority of the executive branch to make charging decisions. This Court further explained

We...hold that article II, section 3, of the Florida Constitution prohibits the judiciary from interfering with this kind of discretionary executive function of a prosecutor.

State v. Bloom, 497 So. 2d at 3. In Stuckey, the Fifth District

³The district court opinions in conflict with Stuckey are numerous and include: Clark v. State, 30 Fla. L. Weekly D 1192 (Fla. 4th DCA May 4, 2005); Boland v. State, 893 So. 2d 683 (Fla. 2d DCA 2005); Phillips v. State, 874 So. 2d 705 (Fla. 1st DCA 2004); Belser v. State, 854 So. 2d 223 (Fla. 1st DCA 2003); Youmans v. State, 846 So. 2d 670 (Fla. 4th DCA 2003); Pepitone v. State, 846 So. 2d 640 (Fla. 2d DCA 2003); Burton v. State, 844 So. 2d 721 (Fla. 2d DCA 2003); Thomas v. State, 820 So. 2d 382 (Fla. 2d DCA 2002); Higgs v. State, 801 So. 2d 269 (Fla. 4th DCA 2001); Suarez v. State, 779 So. 2d 665 (Fla. 3d DCA 2001); Farley v. State, 740 So. 2d 5 (Fla. 1st DCA 1999); Epps v. State, 728 So. 2d 761, 762 (Fla. 2d DCA 1999); Greene v. State, 714 So. 2d 554 (Fla. 2d DCA 1998); Kellom v. State, 643 So. 2d 92 (Fla. 3d DCA 1994); Wilson v. State, 622 So. 2d 31 (Fla. 1st DCA 1993);

Court of Appeal overruled and, thus, interfered with the executive branch's discretion regarding a charging decision. As such, the Stuckey opinion also conflicts with State v. Bloom.

Finally, the Fifth District Court of Appeal's decision in Stuckey also conflicts with this Court's State v. Abreau, 363 So. 2d 1063 (Fla. 1978), opinion. In Abreau, this Court explained the distinction between necessarily lesser offenses and permissive lesser offenses as follows:

[I]f a defendant is charged with offense "A" of which "B" is the next immediate lesser-included offense (one step removed) and "C" is the next below "B" (two steps removed), then when the jury is instructed on "B" yet still convicts the accused of "A" it is logical to assume that the panel would not have found him guilty only of "C" (that is, would have passed over "B"), **so that the failure to instruct on "C" is harmless.**

Id. at 1064 (Emphasis added). As noted by this Court in Abreau, it is not logical to assume that the panel would have found Respondent guilty only of the permissive lesser offense if given the opportunity, after having passed over the necessarily included offense of petit theft.

Here, the necessarily lesser instruction as well as another permissive lesser charge were given, and the requested lesser

Hutchinson v. State, 580 So. 2d 257 (Fla. 1st DCA 1991).

was two steps removed from the robbery conviction, thus satisfying the harmless error standard set forth in Abreau. The Fifth District Court of Appeal's rationale for refusing to find any error harmless beyond a reasonable doubt was because the jury "was not given the opportunity to exercise that [jury pardon] authority with respect to the lesser offense of resisting a merchant." Infra. However, this language conflicts with and has for all intents and purposes negated the harmless error rule set forth in Abreau since in every case where an instruction on a permissive lesser offense is not given a jury will not have the opportunity to exercise its pardon power. Essentially, then, the Fifth District Court of Appeal has created a *per se* rule that will never permit the application of the Abreau harmless error rule.

The Fifth District Court of Appeal's opinion in Stuckey expressly and directly conflicts with the foregoing cases of this Court and of the district courts of appeal. Jurisdiction should be accepted.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court accept jurisdiction in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Petitioner has been furnished by hand delivery to Raymond M. Warren, Esq., at 444 Seabreeze Blvd., Suite 617, Daytona Beach, Florida 32118, this _____ day of September, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,
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