IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CURTIS FOSTER,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

v.

STATE OF FLORIDA,

CASE NO. 1D00-4334

Appellee.

_____/

Opinion filed December 24, 2003.

An appeal from the Circuit Court for Duval County.
L. Haldane Taylor, Judge.

Nancy A. Daniels, Public Defender; M. J. Lord, Assistant Public Defender, Tallahassee, for Appellant.

Charlie Crist, Attorney General; Edward C. Hill, Jr., Senior Assistant Attorney General and Robert L. Martin, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING

PER CURIAM.

Appellant's motion for rehearing alleges that he is entitled to a reversal of his conviction on account of the decision in Reed v. State, 27 Fla. L. Weekly S1045 (Fla. Dec. 19, 2002), which came down after we originally decided his case. See Foster v. State, 27 Fla. L. Weekly D1360 (Fla. 1st DCA, June 12, 2002). As we made clear in

our original opinion, "[s]olely on the narrow ground of non-preservation--and only because we [we]re so constrained by the decision in Reed [v. State, 783 So. 2d 1192 (Fla. 1st DCA 2001)], [then] pending review in our supreme court--d[id] we affirm appellant's conviction." Foster, 27 Fla. L. Weekly at D1363 (footnote omitted).

In subsequently quashing the decision by which we were then constrained, our supreme court held that misstating an element of an offense in instructing the jury -- even in accordance with an often used standard jury instruction -- constituted fundamental error requiring reversal without regard to the usual rules of preservation because "the inaccurate definition of malice [the element at issue in Reed] reduced the State's burden of proof" on a disputed element. Reed, 27 Fla. L. Weekly at S1045. In the present case, too, the jury instructions contained an inaccurate and incomplete definition of a disputed element of the offense, which requires reversal for a new trial. See Fitzpatrick v. State, 28 Fla. L. Weekly S679 (Fla. Sept. 11, 2003).

We certify the following question as a question of great public importance.

> HAS SECTION ONE OF CHAPTER 2001-58, LAWS OF FLORIDA, LEGISLATIVELY OVERRULED DELGADO v. STATE, 776 So. 2d 233 (Fla. 2000), AS TO CASES NOT FINAL AT THE TIME OF SUCH DECISION IN WHICH THE OFFENSES WERE COMMITTED ON OR AFTER FEBRUARY 1, 2000, THEREBY PERMITTING A TRIAL COURT TO INSTRUCT A JURY THAT IT MAY FIND A DEFENDANT GUILTY OF BURGLARY, DESPITE

> EVIDENCE SHOWING A LEGAL ENTRY INTO THE PREMISES AND THAT AN OFFENSE WAS COMMITTED THEREIN WHILE THE DEFENDANT REMAINED WITHIN NON-SURREPTITIOUSLY?

Reversed and remanded.

ERVIN, BARFIELD, and BENTON, JJ., CONCUR. ERVIN, J., CONCURS SPECIALLY WITH A WRITTEN OPINION. BARFIELD, J., CONCURS SPECIALLY WITH A WRITTEN OPINION.

ERVIN, J., concurring.

The question certified by this court asks the Florida Supreme Court to decide an issue which the court alluded to, but did not decide, in Floyd v. State, 850 So. 2d 383 (Fla. 2002). In Floyd, one of the questions raised was whether the trial court fundamentally erred in instructing the jury that it could find the defendant guilty of armed burglary if, at the time he remained inside a residence, he had formed the intent to commit an offense, when there had been no showing that the "remaining in" was accomplished surreptitiously. Relying on the Fifth District's analysis in Valentine v. State, 774 So. 2d 934 (Fla. 5th DCA 2001), the supreme court concluded that the giving of the instruction was fundamental error, requiring reversal of the conviction for armed burglary. Floyd, 850 So. 2d at 401-02.

The offense in Floyd occurred in 1998, well before February 1, 2000, the date the legislature, in section 810.015(2), Florida Statutes (2001), declared the supreme court's decision in Delgado v. State, 776 So. 2d 233 (Fla. 2000), to be contrary to legislative intent and therefore null. In deciding the case as it had, the supreme court added the following important footnote to its opinion:

> We are aware that in enacting section 810.015(2), Florida Statutes (2001), the Legislature stated its intent "that the holding in Delgado v. State . . . be nullified." However, the Legislature also stated that subsection (2) of § 810.015 would "operate retroactively to February 1, 2000." The

> events in Floyd's case occurred well before February 1, 2000. Therefore, because the events in Floyd's case do not fall within the window established by the Legislature for retroactive application of section 810.015(2), we need not address the issue of the retroactive effect of the statute. See R.C. v. State, 793 So. 2d 1078, 1079 n.1 (Fla. 2d DCA 2001) (reversing defendant's conviction for burglary of a dwelling, based on Delgado v. State, and noting that the Legislature's language in section 810.015(2) regarding the nullification of Delgado did not apply because the defendant's actions took place prior to February 1, 2000).

Floyd, 850 So. 2d at 402 n.29. In the case at bar, Foster was convicted of a burglary committed on April 22, 2000.

The supreme court recently made clear what it had intimated in Floyd, *i.e.*, that the legislative amendment had no applicability to alleged burglarious conduct committed before February 1, 2000, but it again left open the question whether conduct that occurred thereafter was so affected. See State v. Ruiz, 28 Fla. L. Weekly S855 (Fla. Dec. 18, 2003). I find it interesting that in so deciding, the court declined to reach the question actually certified to it by the Third District, which asked whether the amendment had overruled Delgado as to crimes committed on or before July 1, 2001,[1] but rephrased it to ask whether the amendment applied to such conduct that

[1]In section 810.02(1)(b), Florida Statutes (2002), the legislature specified that its new definition of burglary, providing that the offense can be accomplished by remaining within a dwelling, structure or conveyance after permission to remain within has been withdrawn, applied to offenses committed after July 1, 2001.

occurred prior to February 1, 2000. As a result of the court's decision in Ruiz, one can appropriately conclude the following: That in regard to alleged burglarious acts occurring before February 1, 2000, the court will rule the nullification amendment inapplicable. As to conduct occurring thereafter, how the court will construe the statute is less clear. It is possible that the court will defer to the legislative will and hold that Delgado has no continuing efficacy. On the other hand, the court could decide that because the amendment is a penal statute and no notice was provided the public of the legislative intent until the effective date of the statute, which took place on May 25, 2001,[2] the amendment is applicable only as to conduct transpiring after said date.

I question whether the decision Judges Benton and Barfield rely on, Fitzpatrick v. State, 28 Fla. L. Weekly S679 (Fla. Sept. 11, 2003), requires reversal and remand. In Fitzpatrick, the crime occurred on February 8, 1980, also before the effective date of the amendment to section 810.015(2). Fitzpatrick is consistent with Delgado, wherein the court limited its application to pending cases but not to cases that had become final before its original decision on February 3, 2000. Delgado 776 So. 2d at 241. See also Jimenez v. State, 810 So. 2d 511 (Fla. 2001). Fitzpatrick clearly did not

[2]See Ch. 2001-58, § 4, at 406, Laws of Fla.

address the question left unanswered in Floyd and Ruiz as to whether the nullification amendment applied to a defendant who committed burglary after February 1, 2000, as was charged against appellant Foster.

In deciding Delgado, the court based its limiting construction of the burglary statute upon what it perceived to be the legislative intent, rather than any constitutional provision. See Delgado 776 So. 2d at 241 n.7; Jimenez 810 So. 2d at 512-13 (observing that Delgado need not be given retroactive application, because the decision is not constitutional in nature nor does it have fundamental significance). Because Delgado is based purely on the court's interpretation of the statute, I would ordinarily have considered that the nullification amendment, enacted during the year following the decision, should have ended any controversy over the legislature's intent in adding the "remaining in" language to the burglary statute. It has long been recognized that when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." Lowry v. Parole & Prob. Comm'n, 473 So. 2d 1248, 1250 (Fla. 1985). See, e.g., Barns v. State, 768 So. 2d 529, 530-33 (Fla. 4th DCA 2000); Matthews v. State, 760 So. 2d 1148, 1150 (Fla. 5th DCA 2000); State v. Nuckolls, 606 So. 2d 1205, 1207 (Fla. 5th DCA 1992). Consequently, such laws do not violate the constitutional

prohibition against *ex post facto* laws. See Skeens v. State, 556 So. 2d 1113 (Fla. 1990).

Because of the uncertainty attending the application of the legislative amendment to cases pending at the time the amendment took effect on May 25, 2001,[3] such as that at bar, I concur in the result, albeit reluctantly.

[3]Ch. 2001-58, § 4, at 406, Laws of Fla.

BARFIELD, J., concurring.

In concurring with the court's opinion, I recognize that there remains open the question of whether this crime committed before Delgado v. State, 776 So. 2d 233 (Fla. 2000) became final, tried after Delgado became final, but not yet final when the legislature made Chapter 2001-58, section 1, Laws of Florida, effective retroactively to a date preceding the date the crime was committed, is controlled by Delgado. To conclude that Delgado does not control this case would attribute to the legislature the same incongruity toward defendants that the supreme court has evidenced in its opinions.

It is apparent to me that the legislature, in setting a retroactive date of February 1, 2000, intended to reject the Delgado decision as inconsistent with long-standing legislative intent that had been understood by the courts for years until the Delgado decision. It did not intend to differentiate between crimes committed before February 1, 2000, and those committed on or after that date. The legislature would have been better served had it omitted a specific retroactive date and simply said that the Delgado decision was wrong.

Given this view of Chapter 2001-58, section 1, Laws of Florida, it is my opinion that Fitzpatrick v. State, 28 Fla. L. Weekly S679 (Fla. Sept. 11, 2003), leaves us no alternative but to reverse.