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Article 17

Criminal Law - Burglary - Unlawful Entry Implied Ipso Facto by Intent of Accused

Fred Shandling

the broker to recover his commission whenever the vendor makes an inexplicable withdrawal from the proposed sale. It remains a matter of conjecture whether or not the principle established will be accepted by other courts when confronted with a similar situation.

Victor Savikas

CRIMINAL LAW–BURGLARY–UNLAWFUL ENTRY IMPLIED IPSO FACTO BY INTENT OF ACCUSED

In response to an ADT alarm, police discovered the defendant in the Chicago Historical Society Museum after closing hours. At the time of his apprehension the defendant was situated in a room in which a showcase was pried open, a screwdriver lay on the floor, and a button matching those remaining on defendant's shirt was found nearby. Proceedings were commenced by the State under the Illinois burglary statute; the State electing to prosecute under that provision which makes unlawful an unauthorized entry into a building with intent to commit a felony or theft therein.[1]

Defendant was convicted and appealed contending that the requisite element of entry without authority had not been established by the prosecution. The conviction was affirmed, the Illinois Appellate Court holding that the statutory requirement of an unauthorized entry need not be shown directly by the State, but may be found presumptively through proof of the preconceived intent of the wrongdoer to commit a felony or theft therein. *People v. Schneller*, 69 Ill. App. 2d 50, 216 N.E.2d 510 (1966).

The importance of the *Schneller* decision is at once apparent when viewed in conjunction with the requirements contained in the Criminal Code of 1961, and other related decisions. In the case at bar the court ruled, in effect, that the statutory requirement of entering "without authority" will be established ipso facto where the entry is coupled with an intent to commit a felony or theft. The holding thus serves to obliterate the former requirement present both at common law and under prior

[1] ILL. REV. STAT. ch. 38 § 19-1(A) (1965) which states:
"A person commits burglary when without authority he knowingly enters or without authority remains within a building, . . . with intent to commit therein a felony or theft."
It is interesting to note that the State did not choose to indict the accused under that portion of the statute which makes unlawful the remaining within a building without authority. This would have avoided the controversial issue as to whether one can enter a public museum during the period in which it is open, without authority.

Illinois enactments, that the State prove not only the existence of a felonious intent, but the character of the entry as well.

Basic to any meaningful understanding of *Schneller*, is an appreciation of the crime of burglary. At common law, the character of the entry was a pivotal element in establishing the offense. Blackstone defined burglary as the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony therein.[2] Mere entry with the requisite intent, absent the other elements, was not sufficient to constitute the crime; all the requirements had to be met.[3] This rather formal and rigid concept of burglary did not, however, meet with wide acceptance in the United States, and subsequent statutory enactments often discarded or modified one or more of the common law requirements.[4] Nonetheless, the influence of Blackstone is still apparent in those jurisdictions which even today require that both the breaking and entering be established.[5] In these states, as at common law, mere proof of an entry with intent to commit a felony is not sufficient to sustain a burglary conviction. In the case of *State v. Newbegin*,[6] the defendant entered a dry goods store in Portland, along with several other shoppers, and then proceeded to steal twenty yards of satinett. The court held that entrance into the store in the same manner as all other customers did not satisfy the statutory requirement of a breaking so as to constitute the crime. A similar result was obtained where the accused had entered an inn in which he was lodging, even though the requisite felonious intent was present.[7]

A second group of states have abandoned all qualifications as to entry,

[2] 4 BLACKSTONE, COMMENTARIES 224 (12th ed. 1795).

[3] 1 HAWKINS, PLEAS OF THE CROWN 130 (8th ed. 1824).

[4] CAL. ANN. PENAL CODE § 459 (West 1955). ILL. REV. STAT. ch. 38 § 19-1(A) (1965).

[5] ALA. CODE tit. 14 § 85 (1958); ARK. STAT. ANN. § 41-1001 (1964); CONN. GEN. STAT. §§ 53-76 (1958); DEL. CODE ANN. tit. 11 § 392 (Cum. Supp. 1964); CODE GA. ANN. § 26-2401 (1953); IND. STAT. ANN. § 10-701 (Burns 1956); IOWA CODE ANN. § 708.1 (1946); KAN. STAT. ANN. § 21-513 (1963); ME. REV. STAT. ANN. ch. 17 § 751 (1964); MD. ANN. CODE art. 27 § 30 (1957); MASS. ANN. LAWS ch. 266 § 15 (1956); MICH. COMP. LAWS § 750.110 (1948); MISS. CODE ANN. § 2036 (1942); MO. ANN. STAT. § 560.040 (Vernon Cum. Supp. 65); NEB. REV. STAT. § 28-532 (1956); N.H. REV. STAT. § 583:2 (1955); N.Y. CONSOL. PENAL LAWS § 400 (McKinney 1965); N.C. GEN. STAT. § 14-51 (1953); N.D. CENT. CODE ANN. § 12-35-02 (1960); OHIO REV. CODE ANN. § 2907.09 (Page's Cum. Supp. 1965); 21 OKLA. STAT. ANN. § 1431 (1951); R.I. GEN LAWS ANN. § 11-8-2 (1956); S.C. CODE § 16-331 (1962); TEX. PENAL CODE ANN. § 1389 (Vernon 1961); VT. STAT. ANN. tit. 13 § 1201 (1959); VA. CODE § 18.1-86 (1950); WASH. REV. CODE ANN. § 9.19.010 (1961).

[6] 25 Me. 500 (1846). *Contra*, People v. Sine, 277 App. Div. 908 (1950).

[7] State v. Moore, 12 N.H. 42 (1841).

except the entry itself.[8] In these jurisdictions, the legislatures oftentimes have been swayed by the proposition that the gravamen of the offense is the felonious intent of the actor, rather than the nature of the entry.[9] Under statutes of this type, one who enters a store open for business with the requisite intent, invariably will be convicted of burglary.[10] The fact that there has been no breaking, or even that the entry was not wrongful, has been held to be of no consequence. In *People v. Brittain*,[11] the court declared, it is immaterial that the act of entering was not of itself a trespass, but was during business hours, and while the store entered was open to the public. This reasoning has also applied to a switchman who has unlimited authority to enter a railroad station[12] or a boarder who has permission to pass through another's room in order to reach his own[13] or to a hustler who enters a pool room during business hours.[14] It has even been applied to the anomalous situation where the defendant has secreted himself in a trunk with the intention of entering a warehouse to commit a theft, and the trunk is allowed to be brought in with the manager's knowledge, at the behest of the police who are awaiting his arrival with glee.[15]

Our main area of concern, however, lies in those middle of the road jurisdictions which, while eliminating the requirement of a physical breaking, still require some proof of the wrongful nature of the entry.[16] The prior Illinois burglary statute illustrated this point. Formerly a willful and malicious entry was required to be made in conjunction with the

[8] ARIZ. REV. STAT. ANN. § 13-302 (1956); CAL. PENAL CODE ANN. § 459 (West 1955); FLA. STAT. § 810.03 (1965); IDAHO CODE ANN. § 18-1401 (Cum. Supp. 1963); MONT. REV. CODES § 94-901 (Cum. Supp. 1965); NEV. REV. STAT. tit. 16 § 205.060 (1953); UTAH CODE ANN. § 76-9-1 (1953).

[9] People v. Robles, 207 Cal. App. 2d 891, 24 Cal. Rptr. 708 (1962).

[10] People v. Talbot, 51 Cal. Rptr. 417, 64 P.2d 633 (1966); People v. Barry, 94 Cal. 481, 29 Pac. 1026 (1892); People v. Wilson, 160 Cal. App. 2d 606, 325 P.2d 106 (1958); People v. Corral, 60 Cal. App. 2d 66, 140 P.2d 172 (1943); *Contra*, State v. Mish, 36 Mont. 168, 92 Pac. 459 (1907).

[11] 142 Cal. 8, 75 Pac. 314 (1904).

[12] State v. Owen, 94 Ariz. 354, 385 P.2d 227 (1963).

[13] State v. McCreary, 25 Ariz. 1, 212 Pac. 336 (1923).

[14] State v. Bull, 47 Idaho 336 (1929).

[15] People v. Descheneau, 51 Cal. App. 437, 197 Pac. 126 (1921).

[16] ALASKA COMP. LAWS ANN. § 11.20.090 (1962); COLO. REV. STAT. ANN. § 40-3-5 (1963); LA. REV. STAT. § 14:62 (1950); MINN. STAT. ANN. ch. 609.58 (1963); N.M. STAT. ANN. § 40A-16-3 (1953); ORE. REV. STAT. § 164.220 (1963); PA. STAT. ANN. tit. 18 § 4901 (Purdon 1939); WIS. STAT. ANN. § 943.10 (West 1958); WYO. STAT. ANN. § 6-129 (1957).

felonious intent.[17] According to the drafters, the Criminal Code of 1961 was not intended to change the substantive law of burglary, and thus Illinois remains within this grouping.[18]

The courts in a dwindling number of states comprising this group continue to interpret their burglary statutes as requiring two distinct elements to the crime, these two being the preconceived felonious intent, coupled with an entry that is wrongful per se.[19] Through this interpretation the intent does not color the entry in any manner, and the entry must be shown to be trespassory in order that the offense be completed. In Smith v. State,[20] the court held:

> The Alaska statute does not say or suggest that a simple entry is presumed to be unlawful if the requisite intent is present. The character or kind of entry is expressly qualified; it must be unlawful in itself, that is, trespassory, and without regard to the second element of the crime, the intent to steal.[21]

Therefore, in these jurisdictions, where one enters a building with a key furnished to him by the owner[22] or by invitation of his mistress,[23] he cannot be guilty of burglary, even where the entry is made with the requisite felonious intent.

The trend in judicial reasoning today, however, is to discard the notion that there are two distinct elements required to constitute an unlawful entry. In the case of *People v. Kelley*,[24] decided under prior Illinois law, the defendant was charged with burglary when he entered a drug store during business hours and proceeded to pick the customers' pockets. The Illinois Supreme Court reversed this conviction holding that the State had failed to prove the preconceived intent to commit the theft. By implication, had the intent been proven, the conviction would have have been upheld. In *Schneller*, the Appellate Court accepted this implication in affirming the conviction, reasoning that the intent had been shown. Thus, in the case at bar, Illinois has aligned itself with the more liberal interpretation. For example, in *Pinson v. State*,[25] the Arkansas Supreme Court held that one entering a liquor store which is open for business, with the

[17] ILL. REV. STAT. ch. 38 § 84 (1959).

[18] ILL. ANN. STAT. ch. 38, § 19-1 (Smith-Hurd, 1963) Comments:
"Therefore, section 19-1 is merely a codification of the existing law in Illinois, combining the unlawful entry of various types of spaces prohibited by section 84 with the burglar found in building prohibition of section 86."

[19] Smith v. State, 362 P.2d 1071 (Alaska 1961). See Annot. 93 A.L.R.2d 525.

[20] Smith v. State, *supra* note 19. [21] *Id.* at 1073.

[22] People v. Stowell, 104 Colo. 255, 90 P.2d 520 (1939).

[23] United States v. Agas, 4 Phil. 129 (1905).

[24] 274 Ill. 556, 113 N.E. 926 (1916).

[25] 91 Ark. 434, 121 S.W. 751 (1909).

intent to commit theft, was guilty of burglary. Application of this interpretation has resulted in convictions for one who enters a tavern with the intention of stealing a Latex machine,[26] or whiskey,[27] and now to one who enters a museum.[28]

The foregoing cases thus stand for the proposition that the showing of a preconceived intent to commit a felony or theft is conclusive proof that the entry is wrongful.[29] This of course, relieves the prosecution of the burden of establishing that the entry was wrongful per se. The State is, in effect, aided by what could well be termed a conclusive presumption of unlawfulness. The rationale most often employed is that one who enters with a felonious intent is not within the class to whom an invitation was extended,[30] and thus, he is present without authority[31] or unlawfully[32] or willfully and maliciously.[33] By employing this type of a priori reasoning, the courts in essence have amalgamated the once district elements of the crime.

Thus, this trend in the law of burglary can be seen in both the legislative and judicial vein. It amounts to an emasculation of the prior concept of burglary which viewed the character of the entry as the evil from which protection was sought, and substitutes in its stead the intent of the offender. Consequently, in Illinois, as a result of *Schneller*, it is entirely conceivable that the common shoplifter could well be convicted of burglary.[34] Since shoplifting in most instances merely constitutes the misdemeanor of petit theft under the Criminal Code of 1961,[35] to permit a felony conviction under such circumstances seems rather incongruous. One can only speculate as to whether the Appellate Court foresaw the ramifications of its holding, and intended such a far-reaching result.

Fred Shandling

[26] Commonwealth v. Schultz, 168 Pa. Super. 435, 79 A.2d 109 (1951), *cert. denied* 342 U.S. 842.

[27] Walders v. State, 101 Ark. 345, 142 S.W. 511 (1912).

[28] People v. Schneller, 69 Ill.App.2d 50, 216 N.E.2d 510 (1966).

[29] *Supra* note 25.

[30] *Id.* at 439, 121 S.W. at 753.

[31] *Supra* note 28.

[32] *Supra* note 25.

[33] *Supra* note 26.

[34] This result has been attacked by such eminent authorities as Professor Perkins who points to the gross inequity of subjecting a mere shoplifter to penalties entirely out of proportion to the seriousness of the offense. PERKINS, CRIMINAL LAW 153 (1957). Additional support for this view is found in the MODEL PENAL CODE § 221 (1962), MINN. STAT. ANN. ch. 609.58-1(1) (1963), WIS. STAT. ANN. § 943.10(3) (West 1955), and WYO. STAT. ANN. § 6-129(c) (1957), all of which declare an entry into a place open to the public to be with consent.

[35] ILL. REV. STAT. ch. 38 § 16-1 (1965).