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and Burglary Tools**

From the Courts

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Burglary, Curtilage, and Burglary Tools

Written by: Jay Wagner: Assistant State Attorney

It seems that as the price of metal rises, so to do the instances of theft where the metal therein becomes a desired item. Law enforcement does not need to watch commodity prices to know when the price of metal is up. Perhaps the most common case of this type is the theft of air conditioner components from the air conditioner outside a home or structure. For the purposes of illustration within this article, I am relying upon the following fact pattern:

A neighbor happens to see a truck parked next to the side of a nearby house. The neighbor finds this to be unusual as he knows the house is in foreclosure proceedings and the former occupants have not lived there for over six months. The neighbor watches for a few minutes, and a subject appears from around the corner. The subject begins removing the air conditioning compressor housing unit at the side of the dwelling. The unit is easy to get to as there is no fence around the unit. The subject and a helper quickly throw the unit into the back of the truck and take off down the street. The neighbor had already called law enforcement and was able to give a description of the truck, its occupants, and the direction of travel. Fortunately, there was a patrol unit in the area, and the unit was able to stop the vehicle. Both subjects were detained, and the neighbor was brought to the scene to identify the subjects (which he did). In the back of the truck were some screwdrivers, a ratchet set, a pipe cutter, and a hacksaw.



Assistant State Attorney, Jay Wagner has been with our office for thirteen years.

Sounds like a burglary, theft, and possession of burglary tools case, right? As you probably know from past experience, things are not always as clear as they may seem.

At first glance, it seems reasonable to believe a burglary has occurred in that the subjects took a fixture from the side of the house and which is arguably under an eave of the house. What, you might ask, is a fixture? Black's Law Dictionary (Fifth Ed. 1979) defines a fixture as: "A thing is deemed to be affixed to land when it is attached to it by its roots, imbedded in it, permanently resting upon it, or permanently attached to what is thus permanent, as

by means of cement, plaster, nails, bolts, or screws." Great, an air conditioner compressor is screwed into a concrete slab next to a house and attached with pipes. The house and the attachment are intended to be permanent so that sounds like a fixture, right? Therefore, removing the fixture has to be a burglary as you are taking it from a dwelling. Again, while that seems logical, it is not as clear cut as you might think.

The courts have chosen to analyze this type of case not on whether the air conditioner compressor unit is a fixture but whether it is part of the "curtilage." F.S. 810.02(2) includes "curtilage" as part of the definition of a dwelling. The courts consequently, have wrestled with what constitutes "curtilage." The Legislature is free to define the elements of a crime and how certain terms are

defined within the elements of the crime. Interestingly, while the Legislature has created a statutory definition of "burglary," it has not defined "curtilage" even though it has included the Common Law term "curtilage" within the definition of "burglary." When the Legislature

does not define a particular word or element, the courts look to the definitions found within Common Law, which is the foundation upon which our current laws have been constructed. Under Common Law, curtilage was generally considered to be the land surrounding a dwelling and enclosed by a fence. Therein lays the issue, which is whether there is some form of enclosure or fencing. In State v. Hamilton, 660 So.2d 1038 (Fla. 1995), the Florida Supreme Court held that entering an unenclosed back yard to steal some boat motors was insufficient to prove burglary since there was no enclosure or fencing around the back yard. In Gonzalez v. State, 724 So.2d 126 (Fla. 3rd DCA 1998), the Court, citing State v. Hamilton, came to the conclusion that in its case, an air conditioning compressor, which was not enclosed by a fence or enclosure, was not part of the curtilage even though it was permanently attached. The Hamilton Court went on to say that the Legislature was free to define curtilage differently from the Common Law but had not done so. Not having done so, the Court was required to use the Common Law definition of curtilage which included a fencing or enclosure component. Perhaps a legislative change will come but for the time being we are stuck with the Common Law definition. It has probably been your experience, as is the case in our scenario above, that most air conditioning compressors outside dwellings are not enclosed within a fence around the dwelling. If that is the case, burglary cannot be charged. It is important for the investigating officer, however, to determine if the theft of the unit caused damage to the real or personal property of the victim in excess of \$1,000.00. If that threshold is met, your suspect can be charged with First Degree Grand Theft, a felony of the first degree under F.S. 812.014 (2)(a).



The second half of the above scenario included the fact that in the bed of the suspect's truck, along with the compressor housing unit, were various tools. Quite often in Felony Intake we see the charge of "Possession of Burglary Tools" without any explanation or link as to how those tools in the truck were connected to the crime. F.S. 810.06 requires that the tools be used or possessed with the intent to be used to

commit a burglary or a trespass. This is important because you will note that it says nothing about being used or possessed with the intent to use them to commit a theft. In Dukes v. State, 796 So.2d 1265 (Fla. 4th DCA 2001), the Court held that the use of a pair of pliers to remove the bolts securing an air conditioner to a window was insufficient to show that the tool was used to commit a burglary. The Court found that the tool was used to commit a theft and the statute did not include theft in its elements. Therefore, in our scenario above, the suspect could not be charged with possessing burglary tools since the tools were used to commit a theft.

As you can see, the initial evaluation of this type of case is highly dependent upon how well the facts of the case are explained in the offense reports provided as part of a felony packet. The key components to a well-written report include establishing whether the item taken was surrounded by some form of fencing or enclosure, whether that fencing or enclosure is so attached to the dwelling (or structure) so that it can be considered curtilage, and whether it can be proven that the tool(s) used in some way aided in the commission of the burglary (or trespass). Covering these elements in your report supplies the Assistant State Attorney reviewing the case with the information he or she needs to make a proper filing decision.

FROM THE COURTS...



<http://www.sao10.com>

Bartow Phone Numbers:

| | |
|------------------------|----------|
| Switchboard | 534-4800 |
| Misdemeanor Intake | 534-4927 |
| Misdemeanor | 534-4926 |
| Domestic Violence | 534-4861 |
| Felony Intake | 534-4987 |
| Felony | 534-4964 |
| Investigations | 534-4804 |
| Violation of Probation | 534-4803 |
| Child Abuse | 534-4857 |
| Homicide | 534-4959 |
| On Call Phone | 860-8243 |
| Worthless Checks | 534-4874 |
| Juvenile | 534-4905 |
| Main Fax | 534-4945 |
| Witness Management | 534-4021 |
| Fax | 534-4034 |

Officers now can submit their vacation to Witness Management at the following email address:

witmanagement@sao10.com

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KIDNAPPING REQUIRES KNOWLEDGE THAT VICTIM IS BEING TAKEN

The defendant was charged with burglary, grand theft, and kidnapping. At his trial, the evidence established that he stole an extended-cab pick-up truck in which a two year old child was sleeping in a child car seat on the back seat. The truck was found a short time later with the child still in the back seat. She was crying but unharmed. The state produced no direct evidence that the defendant was aware that the child was in the truck when he stole it or during the time it was in his possession. He was convicted as charged, but on appeal, the Supreme Court reversed the kidnapping conviction, holding that proof of the defendant's awareness of the child's presence before or during the commission of the underlying felony is necessary to sustain a kidnapping conviction. *Delgado v. State*, 36 FLW S220 (Fla. May 26, 2011).

SEARCH WARRANTS FOR BLOOD CAN ONLY BE OBTAINED WHERE THE DUI IS A FELONY

The defendant was charged with Felony DUI and filed a motion to suppress the results of tests done on samples of his blood which were seized pursuant to a search warrant. Although the defendant was charged with felony DUI based on two prior convictions, the affidavit on which the search warrant was based only alleged that the defendant had one prior conviction. The trial court granted the motion, and on appeal, the Fifth District affirmed, holding that under the search warrant statute, section 933.02, Florida Statutes, the defendant's blood could not be seized as proof of a misdemeanor DUI because of the wording of the statute. However, the court noted that because the statute is worded differently in relation to felonies, the blood could have been seized had a felony DUI been alleged in the affidavit. *State v. Geiss*, 36 FLW D1132 (Fla. 5th DCA May 27, 2011).

STATUTE PROHIBITING SEX WITHOUT TELLING PARTNER OF POSITIVE HIV STATUS EXPLAINED

The defendant was charged with having sexual intercourse without notifying her partner of her positive HIV status in violation of section 384.24, Florida Statutes. She filed a motion to dismiss, asserting that the state could not establish a *prima facie* case of guilt. The facts on which the motion was based were that the defendant had oral sex with and digitally penetrated the vagina of her partner. The trial court denied the motion, and the defendant pled no contest reserving her right to appeal. On appeal, the Second District reversed, holding that section 384.24 prohibits only sexual intercourse without notice and not oral sex or digital penetration. *L.A.P. v. State*, 36 FLW D1223 (Fla. 2d DCA June 10, 2011).