IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CRIMINAL): AC
CASE NO: 502013AP900018AXXXMB
L.T. NO: 502012MM014432AXXXNB

DAVID C. SLAUGHTER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

Opinion filed: AUG 0 6 2014

Appeal from the County Court in and for Palm Beach County,
Judge Marni Bryson.

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Defendant/Appellant, David C. Slaughter was charged with petit theft in the second degree after he used and played scratch-off lottery tickets while working his night shift at a Citgo Gas Station located in Palm Beach County, Florida. Slaughter argues, and the State concedes, that he was entitled to a jury trial under both state and federal law because the case was *malum in se* – a crime at common law, and that the denial of his right to a jury trial was error. We agree and reverse. Slaughter also argues that the trial court erred by overruling several hearsay objections. We agree and address those arguments to avoid repetitive error on retrial.

Right to a Jury Trial

At the outset of the trial, the presiding judge stated that she would not impose jail time and if Slaughter was found guilty, she would withhold adjudication. Though there was a jury ready, the jury did not come in for the trial.[1] The court reasoned that since the charge had been reduced to a second-degree misdemeanor of petit theft, and jail and adjudication had been waived by the court, it was unnecessary for the case to be tried before a jury. Slaughter objected and argued that even though the he was being tried for a second-degree misdemeanor, he was entitled to a jury trial under both state and federal law because the case was a *malum in se* – a crime at common law. The trial court acknowledged Slaughter's argument, but maintained that a trial by jury was unnecessary, stating "I'm not going to have a jury up here for a second-degree misdemeanor and then waiving jail and adjudication." The trial court then proceeded with a non-jury trial. The trial court found Slaughter guilty of petit theft in the second degree following the bench trial.

Florida law guarantees the right to trial by jury with certain limitations:

> In each prosecution for a violation of a state law … punishable by imprisonment, the defendant shall have, upon demand, the right to a trial by an impartial jury in the county where the offense was committed, except as to any such prosecution for a violation punishable for a term of imprisonment of 6 months or less, if at the time the case is set for trial the court announces that in the event of conviction of the crime as charged or of any lesser included offense a sentence of imprisonment will not be imposed and the defendant will not be adjudicated guilty, **unless a right to trial by jury for such offense is guaranteed under the State or Federal Constitution.**

§ 918.0157, Fla. Stat. (2013) (emphasis added). The Sixth Amendment to the United States Constitution also guarantees "the right to a speedy and public trial, by an impartial jury." U.S.

[1] It is unclear from the transcript if a jury had already been selected through the *voir dire* process and was ready to enter the courtroom or whether there simply were jurors available for *voir dire*.

Const. Amend. VI.

While a significant limitation on the Sixth Amendment is the "petty offense" exception, which limits the constitutional guarantee of a jury trial to "serious" crimes, Slaughter's crime falls into one of the four classes of crimes that are considered to be serious. *Whirley v. State*, 450 So. 2d 836, 837 (Fla. 1984). A crime is considered to be serious if it (1) carries a maximum penalty of more than six months in prison; (2) is a crime indictable at common law; (3) is a crime that involves moral turpitude; or (4) is a crime that is *malum in se*, or inherently evil at common law. *Id.* at 838; *Reed v. State*, 470 So. 2d 1382, 1384 (Fla. 1985). Theft is rooted in the common law offense of larceny, which is recognized as a *malum in se* crime. *Reed v. State*, 470 So. 2d 1382, 1384 (Fla. 1985); *Rodriguez Sanchez v. State*, 503 So. 2d 436, 438 (Fla. 4th DCA 1987).

Though petit theft of property is a second degree misdemeanor punishable by a term of imprisonment not exceeding sixty (60) days and/or a fine of up to five hundred dollars ($500.00), Slaughter was nonetheless entitled to a jury trial under the Florida and United States Constitutions because petit theft is a *malum in se* crime. *See Whirley v. State*, 450 So. 2d at 838; *Reed v. State*, 470 So. 2d at 1384. Because petit theft is considered to be a serious crime, the trial court fundamentally erred in denying Slaughter a trial by jury. *See id.* The case is reversed and remanded for a new trial. *See Rodriguez Sanchez v. State*, 503 So. 2d at 438.

Hearsay

Slaughter also argues, and the State concedes, that the trial court erred by overruling several of Slaughter's hearsay objections to testimony given by the State's witnesses. We address only the hearsay that should be excluded when the case is retried.

1. Testimony of Officer Janne

The State concedes that the trial court erroneously admitted testimony of Officer Janne

over Slaughter's hearsay objections. During trial, Officer Janne testified about her conversation with Camille Giordano and Elizabeth Gleasman, managers of Citgo, stating that both managers told her that they suspected Slaughter of stealing lottery tickets. Officer Janne also testified that as she watched the surveillance video, both managers told her that the employee on the video was Slaughter, and that he had stolen over $300.00 in scratch-off lottery tickets. Officer Janne's testimony regarding the managers' statements does not fall within any of the enumerated hearsay exceptions and should be excluded from evidence in the new trial. *See Burkey v. State*, 922 So. 2d at 1035.

2. Testimony of Camille Giordano

The State concedes that the trial court erred in overruling Slaughter's hearsay objections to the testimony of Giordano. At trial, Giordano testified about her phone conversation with Gleasman, relating what Gleasman had told her about the discrepancy in the cash register and lottery records. Because the State used Giordano's testimony of Gleasman's out-of-court statements to prove that the shortage of money was a result of Slaughter stealing lottery tickets, Giordano's testimony regarding Gleasman's statements should be excluded from evidence in the new trial. *See id.*

3. Testimony of Elizabeth Gleasman

Gleasman's testimony regarding the contents of the store reports was hearsay because she testified to the contents of the cash register lottery sales records, which are a business record that the State never submitted into evidence. *See Thompson v. State*, 705 So. 2d at 1047. As a result, Slaughter's hearsay objection to Gleasman's testimony about the lottery ticket records should have been sustained, absent the introduction of these records. *See id.*

Slaughter's judgment and sentence are REVERSED and the case is REMANDED for a new trial.

RAPP, KASTRENAKES, and MILLER, JJ. concur.