

## CRIMINAL LAW

### Criminal Law: Statutory Construction

***State v. Robinson,***  
936 So. 2d 1198 (Fla. 1st Dist. App. 2006)

When the Legislature disapproves of a court's binding construction of a criminal statute, the legislature is free to modify the statute so that the judicial construction does not apply in the future. However, under Article X, Section 9 of the Florida Constitution, the modified statute cannot be applied retroactively to nullify the judicial construction in cases in which the offense occurred prior to the statute's modification.

#### FACTS AND PROCEDURAL HISTORY

Robinson was convicted of burglary under Florida Statutes Section 810.02, which provides that a burglary occurs when a person enters or remains in a dwelling or structure with the intent to commit an offense therein. The conduct giving rise to the charges occurred on January 5, 2000. At trial, Robinson's counsel, in an unsuccessful motion for a judgment of acquittal, indicated that under *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), the burglary statute's "remaining in" clause is satisfied only if the defendant remained in the home surreptitiously after entering. Later, despite her awareness of *Delgado*, Robinson's counsel failed to object to the lack of reference to the "surreptitious" requirement in the prosecutor's argument and the jury instructions.

Robinson appealed his conviction but did not raise the issue of his counsel's above-mentioned failure. During the pendency of his appeal, the Florida Legislature enacted 2001 Florida Laws Chapter 2001-58, codified in Florida Statutes Section 810.015, which purported to nullify *Delgado's* "surreptitious" requirement and provided that the new law was retroactive to February 1, 2000—two days prior to the issuance of *Delgado*. Subsequently, in *State v. Ruiz*, 863 So. 2d 1205 (Fla. 2003), the Florida Supreme Court held that Florida Statutes Section 810.015 did not negate the applicability of *Delgado* to cases in which the alleged burglary occurred prior to February 1, 2000.

After his conviction was affirmed on appeal, Robinson filed a motion for post-conviction relief. Robinson argued that his trial counsel's failure to object to the lack of reference to *Delgado's* "surreptitious" requirement in both the prosecutor's argument and the jury instructions constituted ineffective assistance of counsel. While Robinson's motion was pending, the Florida Legislature enacted 2004 Florida Laws Chapter 2004-93, codified in Florida Statutes Section 810.015(4)–(6), which states that *Ruiz* is contrary to legislative intent and that *Delgado* is inapplicable in all cases, including those in which the alleged burglary occurred before February 1, 2000.

Despite the passage of 2004-93, the trial court granted Robinson's motion. On appeal brought by the State, the First District Court of Appeal affirmed.

#### ANALYSIS

On appeal the State argued that under 2004-93, *Delgado* was inapplicable to Robinson's case; therefore, his counsel's failure to object to the prosecutor's argument and the jury instructions was not ineffective assistance of counsel. The district court rejected this argument, relying on two previous decisions, including *Foster v. State*, 861 So. 2d 434 (Fla. 1st Dist. App. 2003), in which the court rejected the legislature's first attempt to nullify *Delgado* by enacting 2001-58.

In *Foster*, the district court reversed the defendant's conviction for burglarizing a store because, of the two alternative bases on which the conviction rested, one was that the defendant remained in the store with the intent to commit a felony therein, even though he did so non-surreptitiously. In that opinion, the district court found that 2001-58's retroactive provision was unconstitutional in light of Article X, Section 9 of the Florida Constitution, which states, "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." At the time the defendant in *Foster* committed the act, *Delgado* was the law. The legislature then changed *Delgado* by enacting 2001-58, which was permissible to the extent that it applied prospectively. However, the provision purporting to apply 2001-58 retroactively was in violation of Article X, Section 9 because it would increase the available punishment for conduct that had already occurred.

In *Robinson*, the district court quoted *Foster* in recognizing that “the Florida Constitution restricts legislative power by forbidding statutes that authorize sanctions, and proscribing the application of later enacted statutes that ‘affect prosecution,’ for conduct that has already occurred.” *Robinson*, 936 So. 2d at 1201 (quoting *Foster*, 861 So. 2d at 439–440). When the legislature enacted 2004-93, it was attempting to nullify the Florida Supreme Court’s *Ruiz* decision, just as when it enacted 2001-58, it was attempting to nullify the Florida Supreme Court’s *Delgado* decision. Therefore, just as the District Court was required under the Florida Constitution to strike down 2001-58 to the extent that it applies retroactively, so too it is required to strike down 2004-93. The legislature cannot amend a criminal statute in such a way that it would affect the prosecution of conduct that has already occurred.

Because 2004-93 was unconstitutional, it did not affect the applicability of the *Delgado* requirement to the case against Robinson. Consequently, when Robinson’s counsel, who was aware of the *Delgado* requirement, failed to object in response to the prosecutor’s argument and the jury instructions, it amounted to ineffective assistance of counsel. Because there is a reasonable likelihood that the jury would not have convicted Robinson if it had been properly instructed regarding the surreptitious requirement, the trial court properly granted Robinson’s motion for post-conviction relief and ordered a new trial.

#### SIGNIFICANCE

In burglary cases, the defense attorney whose client is accused of committing the offense prior to the enactment of 2001-58 should be aware that, regardless of legislative proclamations to the contrary, under Florida Statutes Section 802.10(1), a person does not “remain in” a dwelling or structure unless she does so surreptitiously, and the jury should be so instructed. Additionally, in any criminal case, the defense attorney should object under Article X, Section 9 of the Florida Constitution to any effort by the State to apply a statute retroactively to nullify a binding statutory construction, and failure to do so may amount to ineffective assistance of counsel.

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RESEARCH REFERENCE

- 10A Fla. Jur. 2d *Constitutional Law* § 398 (Westlaw database updated Aug. 2007).

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