

IN THE SUPREME COURT OF FLORIDA

JOHNNY RAY OWENS, :  
Petitioner, :  
vs. :  
STATE OF FLORIDA, :  
Respondent. :  
\_\_\_\_\_ :

Case No. 64,980

**FILED**  
SID J. WHITE  
MAR 29 1984  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

DISCRETIONARY REVIEW OF DECISION OF  
THE DISTRICT COURT OF APPEAL,  
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

KARLA J. STAKER  
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STATEMENT OF THE CASE

On July 16, 1982, an information was filed in the Circuit Court of Polk County charging Johnny Ray Owens in Count I with robbery with a firearm<sup>1/</sup> and in Count II with possession of a firearm by a convicted felon.<sup>2/</sup> (R1-2)

Jury trial was held October 5, 1982. (R6-191) Owens unsuccessfully requested, orally and in writing, a jury instruction on aggravated assault as a lesser included offense of robbery with a firearm. (R128-129,132-133,192) After the jury was instructed Owens duly objected to failure to give the requested instruction. (R185) Upon being found guilty as charged, Owens was so adjudicated. (R186,188,194-196)

On March 9, 1983, Owens was sentenced to two concurrent fifteen year terms, with credit for time served. (R198-199) A three year mandatory sentence was imposed on Count I. (R198)

On September 16, 1983, the District Court of Appeal, Second District, issued an opinion reversing and remanding. (A1-3) Its mandate followed on October 4, 1983. (A4)

On November 16, 1983, the State filed a motion to recall and modify the mandate. (A4) On November 23, 1983, the District Court entered an order withdrawing and staying the mandate. (A4)

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<sup>1/</sup> §812.13, Fla.Stat. (1981)

<sup>2/</sup> §790.23, Fla.Stat. (1981)

On February 3, 1984, the District Court issued an opinion modifying the mandate and affirming Owens' judgment and sentence. (A4-7) The Court certified its decision on the merits to be in direct conflict with Blow v. State, 386 So.2d 874 (Fla.1st DCA 1980).

Owens filed timely notice to invoke this Court's discretionary jurisdiction.

STATEMENT OF THE FACTS

Around 11:00 p.m. on June 16, 1982, Owens walked into a convenience store in Lakeland. (R13-15,54) He removed a six pack of beer from the cooler and walked to the counter. (R14-15, 54) One clerk was operating the cash register. (R14) A second clerk was also standing behind the counter with her back to the counter. (R15) Owens pulled a gun from his pants, pointed it at the frightened cashier and pulled the hammer back. (R15-16) He instructed the second clerk not to turn around. (R18) The cashier took a bag from under the counter, put money in it and put the bag on the counter. (R17,19) After ordering the clerks into the restroom, Owens left with the bag of money. (R19-22)

Owens did not testify at trial. However, through the testimony of three witnesses who were with him at various times on the night in question, he presented a voluntary intoxication defense. (R95-121)

## ARGUMENT

WHETHER AN INFORMATION WHICH ALLEGES THAT A DEFENDANT "CARRIED" A FIREARM IS SUFFICIENT TO ALLEGE AN ESSENTIAL ELEMENT OF AGGRAVATED ASSAULT, AN OFFENSE THAT IS STATUTORILY DEFINED BY SECTION 784.021(1)(a) AS AN ASSAULT WITH A DEADLY WEAPON.

Aggravated assault is statutorily defined as an assault with a deadly weapon or an assault with intent to commit a felony. §784.021, Fla.Stat. (1981). It is a category (2) lesser offense of robbery. Jackson v. State, 355 So.2d 137 (Fla.3d DCA 1978), cert.denied, 361 So.2d 835 (Fla.1978); Fla.Std. Jury Instr. (Crim.) Schedule of Lesser Included Offenses. That is, it may be a lesser included offense if the information alleges all of its essential elements and if the evidence supports it. State v. Terry, 336 So.2d 65 (Fla.1976).

At the charge conference in the instant case, the trial judge determined that although the evidence presented at trial supported aggravated assault, the essential elements of aggravated assault were not alleged in the information.

Count I charged robbery with a firearm as follows (R1-2):

Johnny Owens...unlawfully, by force, violence, assault or putting in fear, feloniously did take from the person and custody of another, to-wit, Debbie Clouser money or other property, the subject of larceny, to-wit: money in currency and coin of the United States of America, current, a further and better description of which is to the State Attorney unknown, the property of Debbie Clouser, as owner or custodian, and the said Debbie Clouser was then and there entitled

to the possession of the said money in currency and coin of the United States of America, current as against the said, JOHNNY OWENS and the said JOHNNY OWENS was not then and there the owner nor entitled to possession of said money in currency and coin of the United States of America, current and in the course of committing the robbery as afore-said, the said JOHNNY OWENS carried a deadly weapon, to-wit, a firearm, to-wit, a pistol, in violation of Section 812.13, Florida Statutes contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Florida. (Emphasis added.)

The information expressly alleged an assault. It also alleged that in the course of committing a robbery and assault Owens carried a deadly weapon. It did not allege that he carried a concealed weapon. The common sense interpretation of the language as a whole is that Owens assaulted the victim with a deadly weapon.

Thus, all the essential elements of aggravated assault were alleged, as well as supported by the evidence. It was reversible error to deny Owens' request for an aggravated assault instruction.




CONCLUSION

Owens respectfully asks this Honorable Court to reverse his judgment and sentence and remand the case for new trial.

Respectfully submitted,

JERRY HILL  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

BY:

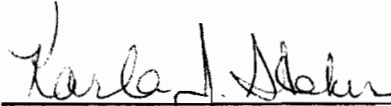
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 27th day of March, 1984.

  
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KARLA J. STAKER

KJS:js