IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 65,824

ERNIE RAY HOLLEY,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLENNA JOYCE REEVES
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

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RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner's brief will be referred to as "PB". The record will be designated as set forth by petitioner. Respondent, Ernie Ray Holley, was the defendant in the trial court, the appellant before the First District Court of Appeal, and will be referred to herein as respondent or by name.

II STATEMENT OF THE CASE AND FACTS

Petitioner's facts are accepted as accurate, but the following is included since petitioner's facts are incomplete.

Richard M. Shope, Sr., an agricultural inspector, testified that on the morning of January 15, 1980, he pursued the van driven by Holley since it had bypassed the inspection station and since he had been unable to determine whether it was a commercial or a passenger-type vehicle (R 65-66). After the van was stopped, Holley purportedly consented to opening the rear doors of the van (R 69). When the doors were opened, Shope observed several plastic bags within the vehicle and detected the odor of marijuana (R 69). Shope then radioed for assistance from the sheriff's office (R 70). Deputy Sheriff Leonard Pease arrived as Shope was advising Holley of his Miranda rights (R 71, 73). Shope slit open a bag with either his finger or a pocket knife and showed Pease the marijuana (R 74-75, 93). Deputy Pease then advised Holley and his passenger that they were under arrest (R 75).

Inspector Shope continued searching the back of the van (R 75). Holley then grabbed Shope, and unbeknownst to him, retrieved his .357 Magnum from his holster (R 100). Holley pointed the gun at both Shope and Pease (R 75-77). While Holley's attention was directed towards Pease, Inspector Shope managed to run across the highway to escape (R 77-78).

Deputy Pease responded to Inspector Shope's radio communication around 3:30 a.m. January 15, 1980 (R 104-105). After

Shope showed Pease marijuana in the back of the vehicle, Deputy Pease advised Holley and his passenger, Mr. Folger, of their Miranda rights and that they were under arrest (R 106-107, 113). Holley then jumped towards Inspector Shope (R 107). When Holley turned back towards Pease, he had a pistol in his hand which he pointed towards Pease (R 107-108). Shope then ran across the highway (R 108). Holley then directed Pease to lie on the ground (R 108). He then removed Pease's pistol from his holster (R 108). Pease then heard the van drive off (R 109). Pease then radioed the jail advising them to notify any agencies to the north (R 110). Pease traveled into Georgia and observed Holley's wrecked van near Valdosta (R 111). Holley was located in the woods approximately twelve hours later (R 112).

Fred Taylor, a trooper with the Georgia State Patrol, stopped Holley's vehicle near the Bellvile exit (R 125-126). Holley, however, reentered the van and drove off at a high rate of speed (R 128-130). Holley's van eventually wrecked into a police car at the road block (R 130).

Grady Dukes, an investigator with the Valdosta Police Department, testified that his police vehicle, which was parked in the road block, was struck by Holley's van (R 136-138).

The state then rested (R 141). In response to Holley's motion for judgment of acquittal, Count IV was reduced to grand theft (R 142-143, 146-149).

William David Folger, Holley's passenger on January 15, 1980, testified that when the inspector asked to look in the

rear of the van, Holley refused and asked him for a search warrant (R 162, 166-167). The inspector then told Holley to step to the rear of the vehicle (R 167). Folger could not hear what was said, but did overhear a heated conversation (R 169). Folger then saw the passenger side of the rear door opening (R 169). Folger saw the inspector go to his patrol car and shortly thereafter another deputy arrived (R 170). At the deputy's directions, Folger exited the van (R 170). Although Holley pointed out the RV sticker on the van, the officers proceeded to search the van (R 170). The Inspector cut a bag with his pocket knife and started sticking the knife in other bags which contained clothing (R 171). When Holley protested, the inspector turned around quickly and pulled the knife up in Holley's face (R 171-172). Holley then pulled the gun from the inspector's holster (R 172). Folger testified that Holley never pointed the gun at the officers but rather pointed it up in the air (R 172). Because the other officer was trying to retrieve his gun, Holley ordered him to lie down and to hand him his gun (R 173). The officer did so (R 173). After taking the keys out of both cruisers, they left in the van (R 173-174).

Holley testified that he refused the inspector's request to inspect the van (R 182-184). Holley indicated that he removed the inspector's gun from its holster because he was afraid that the inspector, who had pulled a knife on him, was going to harm him (R 187-189). Holley indicated that he never pointed the

gun at either officer (R 189-190). Holley told the other officer to hand over his gun because he was afraid he would shoot (R 190). Holley threw both guns away thereafter (R 190-191).

Holley's renewed motion for judgment of acquittal was denied (R 203).

The trial court denied Holley's requested instruction based upon Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981) (R 25, SR 25-26, 11-25).

Holley was found guilty of aggravated assault with a firearm (Count I); resisting an officer with violence (Count II); aggravated assault with a firearm (Count III); grand theft (Count IV); and armed robbery with a firearm (Count V) (R 26-27, 267). Holley was adjudicated guilty on each charge. As to Count V, he was sentenced to 35 years imprisonment with a three year mandatory minimum term (R 34, 275-276). A five year sentence of imprisonment with a three year mandatory was imposed as to Count I, to run concurrent with Count V (R 275-276, 30). On Count II, a five year concurrent term was imposed (R 275, 31). As to Count III, a five year sentence with three year mandatory minimum was imposed to run consecutive to Count V (R 275-276, 32). On Count IV, a five year sentence was imposed to run concurrent with Count III and consecutive to Count V (R 276, 33).

The District Court, concluding that error was committed in giving Florida Standard Jury Instruction (Criminal) 3.04(d) and in failing to give the requested instruction based upon

Ivester, reversed Holley's conviction for resisting arrest with violence. The District Court however certified to this Court the following question:

> IS FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.04(d), A CORRECT STATEMENT OF THE LAW IN LIGHT OF IVESTER V. STATE, 398 So.2d 926 (Fla. 1st DCA 1981), review denied, 412 So.2d 470 (Fla. 1982) AND ALLEN V. STATE, 424 So.2d 101 (Fla. 1st DCA), review denied, 436 So.2d 97 (Fla. 1983)?

III ARGUMENT

ISSUE PRESENTED

IS FLORIDA STANDARD JURY INSTRUCTION (CRIMINAL) 3.04(d), A CORRECT STATEMENT OF THE LAW IN LIGHT OF IVESTER V. STATE, 398 So.2d 926 (Fla 1st DCA 1981), review denied, 412 So.2d 470 (Fla. 1982) AND ALLEN V. STATE, 424 So.2d 101 (Fla. 1st DCA), review denied, 436 So.2d 97 (Fla. 1983)?

In the context of the present case, Florida Standard Jury Instruction (Criminal) 3.04(d), is an incorrect statement of the law. That instruction advises the jury that force can never be used to resist an arrest. Yet, Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981), review denied 412 So.2d 470 (Fla. 1982), and Allen v. State, 424 So.2d 101 (Fla. 1st DCA), review denied, 436 So.2d 97 (Fla. 1983), both recognize that in certain circumstances an individual is entitled to use force to defend himself, even when being arrested. The Ivester principles are correct, and therefore here, where self-defense was relied upon as a defense to the resisting arrest charge as well as the aggravated assault charges, modification of the standard instruction was required or, alternatively, the requested instruction based upon Ivester should have been given.

In Ivester v. State, supra, the First District held that Section 776.051(1), Florida Statutes (1981),[1] does not preclude

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[1] 776.051 Use of force in resisting or making an arrest; prohibition. -

(1) A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer.

(2) A law enforcement officer, or any person whom he has summoned or directed to assist him, is not justified in the use of force if the arrest is unlawful and known by him to be unlawful.

self-defense. The Court reasoned:

> Sections 776.012[2] and 776.051, Florida Statutes (1974), were both enacted as a part of the same act. See Laws of Florida, Chapter 74-383. Statutes that are a part of a single act must be read in pari materia. Major v. State, 180 So.2d 335, 337 n.1 (Fla. 1965). The effect of reading these statutes in pari materia is to permit an individual to defend himself against unlawful or excessive force, even when being arrested. This view is consistent with the position taken by other jurisdictions that have been confronted with questions relating to statutes similar to Sections 776.012, 776.051 and 843.01, Florida Statutes. See e.g., People v. Stevenson, 31 N.Y.2d 108, 335 N.Y.S.2d 52, 286 N.E.2d 445 (1972); People v. Curtis, 70 Cal.2d 347, 74 Cal.Rptr. 713, 450 P.2d 33 (1969); Annot. 77 A.L.R.3d 281
>
> Chapter 776, Florida Statutes, recognizes principles set forth in the case law of other jurisdictions in that the right of self-defense against the use of excessive force by a police officer is a concept entirely different from resistance to an arrest, lawful or unlawful, by methods of self-help.

Id. at 930.

As recognized therein, the Ivester holding is consistent with the view taken by numerous other jurisdictions. See e.g., Gray v. State, 463 P.2d 897 (Alaska 1970); State v. Martinez,

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776.012 Use of force in defense of person. - A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another or to prevent the imminent commission of a forcible felony.

596 P.2d 734 (Ariz.App. 1979); People v. Curtis, 450 P.2d 33 (Cal. 1969); State v. Heiskell, 666 P.2d 207 (Kan.App. 1983); Commonwealth v. Moreira, 447 N.E.2d 1224 (Mass. 1983); State v. Nunes, 546 S.W.2d 759 (Mo.App. 1977). State v. Mulvihill, 270 A.2d 277 (N.J. 1970); State v. Castle, 616 P.2d 510 (Or.App. 1980); State v. Ramsdell, 285 A.2d 399 (R.I. 1971). These decisions note that the modern trend has been to abrogate the common law rule which authorized the right to use force to resist an unlawful arrest. This trend has been prompted by the recognition that:

> In this era of constantly expanding legal protection of the rights of the accused in criminal proceedings, an arrestee may be reasonably required to submit to a possibly unlawful arrest and to take recourse in the legal processes available to restore his liberty. State v. Koonce, 89 N.J. Super. 169, 183-184, 214 A.2d 428 (App.Div. 1965). State v. Richardson, 95 Idaho 446, 450-451, 511 P.2d 263 (1973), cert. denied, 414 U.S. 1163, 94 S.Ct. 928, 39 L.Ed.2d 117 (1974). An arrestee has the benefit of liberal bail laws, appointed counsel, the right to remain silent and to cut off questioning, speedy arraignment, and speedy trial. State v. Richardson, supra 95 Idaho at 450, 511 P.2d 263. Columbus v. Fraley, 41 Ohio St.2d 173, 179, 324 N.E.2d 735, cert. denied, 423 U.S. 872, 96 S.Ct. 138, 46 L.Ed.2d 102 (1975). As a result of these rights and procedural safeguards, the need for the common law rule disappears - self-help by an arrestee has become anachronistic. People v. Curtis, 70 Cal.2d 347, 353, 74 Cal.Rptr. 713, 450 P.2d 33 (1969). In the Matter of the Welfare of Burns, 284 N.W.2d 359, 360 (Minn. 1979). As the New Jersey court wrote, self-help "is antisocial in an urbanized society." State v. Koonce, supra 89 N.J.Super at 184, 214 A.2d 428.

Commonwealth v. Moreira, supra at 1227. However, these decisions acknowledge that this rationale - that a person illegally arrested can turn to the courts for recourse - does not abrogate the right to self-defense in the face of excessive force by a police officer." The pragmatic rationale of this privilege [the privilege of self-defense against excessive force] recognizes that although liberty can be restored through legal process, life and limb cannot be repaired in a courtroom." State v. Nunes, supra at 762. Accord, State v. Martinez, supra at 736; People v. Curtis, supra at 39; State v. Heiskell, supra at 211; State v. Mulvihill, supra at 280; State v. Ramsdell, supra at 404.

Evidence was presented here supporting the theory that excessive force was utilized by the officers (R 171-172, 173, 187-189, 190). Therefore, under Ivester, respondent was entitled to assert a self-defense claim and was entitled to have his claim resolved by the jury after proper instructions were given by the trial judge.

Petitioner asserts that the instructions given here, viewed as a whole, adequately instructed the jury on the right to defend against unlawful or excessive force, even when being arrested (PB 5-8). Respondent strenuously disagrees. The jury was instructed as follows:

> An issue in this case is whether Ernie Ray Holley acted in self defense, that is, that his use of force was justified, Ernie Ray Holley was justified in the use of force if, first, he reasonably believed that the use of force was necessary while he was acting

> in defense of himself against the imminent use of unlawful force by another person, and the force used was not likely to cause death or great bodily harm. A person is never justified in the use of any force to resist an arrest, therefore, you cannot acquit the defendant under count two, of resisting arrest on the ground of self-defense, if you find the following facts have been proved.
>
> First, the defendant Ernie Ray Holley was being arrested by Leonard Pease. And second, the defendant knew Leonard Pease was a law enforcement officer, or Leonard Pease reasonably appeared, under the circumstances to be a law enforcement officer.

(R 255-256) [Emphasis supplied].[3] Plain and simply, the jury was erroneously told that the use of force is never justified if the individual is being arrested.[4] The only logical and reasonable interpretation of these instructions is that while the defense of self-defense exists, an exception to this rule applies where an individual is being arrested and, in that circumstance, self-defense is not viable. Since the jury instructions given constituted a misstatement of law, the District Court correctly reversed respondent's conviction for resisting arrest.

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[3] Respondent's requested instruction which provided, inter alia, that "If the law enforcement officer used more force than was reasonably necessary to arrest the arrestee, the arrestee may defend himself against the unlawful or excessive force used by the law enforcement officer" was denied (R 25, SR 25-26, 11-25). This denial was erroneous and entitles respondent to a new trial. Cf. State v. Kraul, 563 P.2d 108 (N.M.App. 1977)(Since defendant had a limited right of self-defense against excessive force by a police officer, he was entitled to an instruction on that limited right).

[4] Moreover, the trial judge's gratuitous remarks here specifically advised the jury that they could not acquit respondent of the resisting charge on the basis of self-defense if they found he was being arrested.

Moreover, the erroneous instructions given here necessitate a reversal of respondent's aggravated assault convictions as well.[5] Self-defense is clearly a defense to charges of aggravated assault. Taylor v. State, 301 So.2d 123 (Fla. 4th DCA 1974). The instructions given here, as previously noted, were reasonably susceptible to the interpretation that if respondent was being arrested he had no right to claim self-defense. Since the evidence showed that the aggravated assaults and the resisting charge were coterminous in time, the jury could reasonably conclude that self-defense was not viable at all since respondent was being placed under arrest. For that reason, the erroneous instructions may well have precluded proper consideration of the self-defense claim as to the aggravated assault charges as well.

Therefore, respondent requests that the reversal of his resisting conviction be upheld and that his aggravated assault convictions be reversed for a new trial.

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[5] Since jurisdiction is properly in this Court, respondent submits this claim may properly be considered. See Trushin v. State, 425 So.2d 1126 (Fla. 1983).

IV CONCLUSION

Florida Standard Jury Instruction (Criminal) 3.04(d) is an incorrect statement of law when the defense is predicated upon the claim that excessive force was used by a police officer in effectuating an arrest. In that circumstance, the instruction must be modified to recognize this limited right of self-defense against the police officer. Since the instructions given here failed to so advise the jury, respondent is entitled to a new trial where his self-defense claim may be considered after proper jury instructions.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

GLENNA JOYCE REEVES
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Wallace Allbritton, The Capitol, Tallahassee, Florida; and by mail to Mr. Ernie Ray Holley, #086985, 02-136, Post Office Box 628, Lake Butler, Florida, 32054, this 10th day of October, 1984.

GLENNA JOYCE REEVES
Assistant Public Defender