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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

-v-

ERNIE RAY HOLLEY,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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JURISDICTIONAL BRIEF OF PETITIONER

PRELIMINARY STATEMENT

References to the appendix submitted with this brief will be made by the symbol "A" followed by appropriate page number. The record filed in the lower court consists of four volumes. Vols. I-III are consecutively paginated and references thereto will be made by the symbol "R" followed by appropriate page number. References to the supplemental record will be made by the symbol "SR" followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

In an amended five-count information respondent was charged with aggravated assault with a firearm (Count I); resisting arrest with violence (Count II); aggravated assault with a firearm (Count III); armed robbery with firearm (Count IV); and armed robbery with firearm (Count V).

Trial commenced on March 10, 1982. At the conclusion of the trial, motion for judgment of acquittal was denied (R-203). The trial judge denied respondent's requested instruction based upon Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981) (R-25); (SR-25, 26, 11-25). The jury was instructed in pertinent part 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. Use of any force by a law enforcement officer is not justified if, first, the arrest is unlawful, and second, it is known by the officer or the person assisting him to be unlawful.
>
> A law enforcement officer or any person whom he summoned or directed to assist him is not required to retrieve or give up his efforts to make a lawful arrest, because there is resistance or a threat to resist his arrest, the arrest, he is justified in the use of any force that he reasonably believes to be necessary to defend himself or another from bodily harm, by making an arrest or prevent a person who has been arrested, escaping from custody.
>
> In your consideration of the issue of self-defense, or justifiable use of force not likely to cause death or great bodily harm, if you have a reasonable doubt on the question of whether or not the defendant was justified in the use of force, you should find the defendant not guilty. However, if from the evidence you are convinced that the defendant was not justified in the use of force, then you should find him guilty if all the elements of the charge have been proved.

(R-255-257).

Respondent 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). Respondent was adjudicated guilty on each charge. As to Count V, he was sentenced to thirty-five 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). On Count II, a five-year concurrent term was imposed (R-275). As to Count III, a five-year sentence with a three-year mandatory minimum was imposed to run consecutive to Count V (R-275, 276). On Count IV, a five-year sentence was imposed to run concurrent with Count III and consecutive to Count V (R-276).

On direct appeal the lower court reversed in part, holding that the giving of Florida Standard Jury Instruction (Criminal) 3.04(d) (self-defense, justifiable use of force), was error and certified a question to this court as one of great public importance pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure.

ARGUMENT

QUESTION CERTIFIED

> 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).

The question certified should be answered in the affirmative. The complained-of portion of Florida Standard Jury Instruction (Criminal) 3.04(d) provides as follows:

> A person is never justified in the use of any force to resist an arrest. Therefore, you cannot acquit the defendant on the ground of self-defense if you find the following facts have been proved:
>
> 1. The defendant was being arrested by (victim).
> 2. The defendant knew (victim) was a law enforcement officer or (victim) reasonably appeared under the circumstances to be a law enforcement officer.

Id. at 43. When viewed in isolation the above instruction is almost impossible to reconcile with the holdings in 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 1983), review denied, 436 So.2d 97 (Fla. 1983). But the instruction should not viewed in isolation. There is a plethora of case law holding that a challenged instruction should be viewed in light of all the instructions given. Consequently, the

correctness of the challenged instruction sub judice should be determined by a consideration of the whole charge. Stanley v. State, 357 So.2d 1031 (Fla. 3d DCA 1978); Diez v. State, 359 So.2d 55 (Fla. 3d DCA 1978); Barkley v. State, 10 So.2d 922 (Fla. 1943); Driver v. State, 46 So.2d 718 (Fla. 1950); Waters v. State, 298 So.2d 208 (Fla. 2d DCA 1974).

Now, let's bring another portion of the instructions given into focus. On the issue of self-defense, the trial judge first instructed that:

> 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.

Immediately following this general instruction, the trial judge gave the instruction now complained of:

> A person is never justified in the use of any force to resist an arrest. Therefore, you cannot acquit the defendant on the ground of self-defense if you find the following facts have been proved:
>
> 1. The defendant was being arrested by (victim).
> 2. The defendant knew (victim) was a law enforcement officer or (victim) reasonably appeared under the circumstances to be a law enforcement officer.

Now let's analyze these instructions. First, the trial judge instructed the jury that respondent 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, ..." The trial judge then instructed that "[a] person is never justified in the use of any force to resist an arrest," if the jury found certain facts had been proved. First, it must have been proven that respondent was being arrested by Leonard Pease and secondly, that respondent knew Leonard Pease was a law enforcement officer, or reasonably appeared under the circumstances to be a law enforcement officer. If these two facts were proven, then respondent was not justified in the use of any force to resist an arrest. But this does not mean that the former instruction, i.e., use of force in defense of unlawful force by another person, is to be disregarded as just useless words. While a defendant cannot use force to resist an arrest where the requisite facts are known to him, he most certainly can resist the use of unlawful force in the making of that arrest. This is so because when a law enforcement officer uses unlawful or excessive force in effecting an arrest, this brings into play the former instruction that respondent was justified in the use of force if he reasonably believed it necessary "while . . . acting in defense of himself against the imminent use of unlawful force by another person." Put another way, should the law officer use

excessive force in effecting an arrest, he becomes "another person" against whom the use of force is justified.

The upshot of all this is that a person, without more, is not justified in the use of any force to resist an arrest where the requisite facts are known. However, if excessive force is used, then the former instruction comes into play justifying the use of force in self-defense against the unlawful force used by the law enforcement officer. It seems to petitioner that this is the only reasonable way to construe the instructions as given by the trial judge. If a person cannot defend against the use of unlawful force even by a police officer, then the first part of the trial judge's instructions--above quoted--is a nullity.

Again, petitioner agrees that the challenged instruction when viewed in isolation cannot be reconciled with Ivester and Allen. However, when the instructions are considered as a whole they are correct. It is believed that the lower court did not view the instructions as a whole but rather, fastened on the challenged instruction in isolation. So doing, the instruction conflicts with Ivester and Allen. But we urge that the instruction must be read just as a part of the total instructions given which encompass instructions justifying the use of force in certain circumstances.

CONCLUSION

The certified question should be answered in the affirmative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Jurisdictional Brief of Petitioner to Ms. Glenna Joyce Reeves, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, by hand-delivery, this 6th day of September, 1984.

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