IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

DAVID GREGORY JACKSON,

Respondent.

5DCA CASE NO. 84-236

FSC CASE NO. 66728

PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

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AUTHORITIES CITED

STATEMENT OF THE CASE

Respondent was charged with the offenses of fleeing or attempting to elude a police officer, battery on a law enforcement officer, and resisting arrest with violence (R 397-398). Prior to trial, appellant filed a motion to suppress and a motion to dismiss (R 411-417), and the motions were denied (R 419, 428). The case proceeded to trial. Judgment of acquittals were likewise denied. The pertinent issue for purposes of this jurisdictional brief was the denial of a special jury instruction requested by appellant (R 326, 466). See, statement of facts, infra. The jury found the defendant guilty as charged on all three (3) charges (R 476-478).

Appellant appealed. The Fifth District Court of Appeal issued its opinion on January 17, 1985 (Appendix 1-4). The opinion affirmed the conviction for fleeing a police officer but reversed for a new trial on the charges of battery on a law enforcement officer and resisting arrest with violence.

On January 31, 1985, petitioner filed a motion for rehearing, clarification, or in the alternative to certify the question to the Supreme Court of Florida. (Appendix 5-7). Thereafter, the Fifth District denied that motion on February 11, 1985. Petitioner's brief on jurisdiction to this court follows.

STATEMENT OF FACTS

Roger Wandell of the Sanford Police Department was on routine patrol at 12:30 p.m. He saw three (3) black males together who all quickly left in different directions as he approached him in his patrol car. He wanted to talk to each of them but appellant went into his car and drove away at a high speed. At this point, Officer Wandell contacted Officer Borges to pursue and stop the appellant in his automobile for questioning. (R 95-108).

Officer Borges testified on behalf of the state that he was on duty that night and responded to Officer Wandell's radio dispatch (R 122). Officer Borges pursued the appellant who apparently was about to stop but then sped off again and Officer Borges did use his siren and light (R 123). Officer Brewster also joined the chase in his patrol car (R 127). Borges saw the appellant run a stop sign (R 130). The chase continued with the patrol cars using their blue lights and siren (R 132). The chase finally ended when Brewster's patrol car collided with appellant's automobile (R 124). Borges saw Brewster approach appellant in his automobile and Brewster drew his gun (R 137). Brewster holstered his gun but Borges went to help Brewster remove appellant from the automobile and arrest him for fleeing and attempting to elude. (R 139-140). At this point, the appellant grabbed the testicles of Officer Brewster (R 140). The appellant would not let go so Officer Borges struck the appellant with his flashlight. Borges testified that appellant did let go finally when Officer Brewster punched the appellant on appellant's arm (R 141). As appellant was being cuffed and removed from his car, Borges testified that appellant kicked a number of times at Brewster while Brewster and another officer were trying to handcuff him (R 143). Appellant ceased to struggle for a while, but when appellant was being placed in the police patrol car he commenced to kick the officers again (R 144). Borges estimated that appellant grabbed on to Brewster's

testicles for approximately two (2) minutes (R 166).

Guy Brewster of the Sanford Police Department also testified on behalf of the state and confirmed the testimony of Officer Borges. Brewster explained that when he first approached appellant in his car after the collision, he saw appellant lying down in the car so he drew his revolver because he did not know if appellant had any weapons and he could not see his hands (R 182). He also corroborated Borges' testimony that appellant grabbed his gun. But when Brewster saw no weapons he holstered his gun (R 182-183). Brewster confirmed that as he approached appellant in his car the appellant flung his arms wildly and then he grabbed the testicles of Brewster (R 183). Brewster testified it took him at least ten (10) punches to break the hold on Brewster's testicles (R 184). He also confirmed that the hold on his testicles was forceful (R 185). He told the jury that appellant struggled when he was being placed in the vehicle and kicked Brewster at the station a second time (R 209).

After the state rested, defense made a judgment of acquittal motion to the effect that the stop was not lawful pursuant to a motion that had already been filed (R 216). A motion to dismiss and a motion to suppress evidence in testimony had been filed by defense prior to the trial (R 413-416). The defense also moved to have counts II and III dismissed because the officers were not in a lawful performance of their duties (R 216). These motions were denied.

A police nurse testified on behalf of the appellant. She told the jury the appellant had minor lacerations under his lip and some scratches on his wrist, knuckle, and right elbow. He also refused treatment. (R 223-230).

James Mike, a neighbor of appellant saw the aftermath of the events leading to the stop of appellant's car. He was not sure if the police officers struck appellant, but he did indicate that they had their clubs out. He did

not see appellant kick anyone. (R 233-243). Delores Walker stated she saw the policemen striking the appellant on his head (R 245). Another witness saw the police officers trying to handcuff the appellant and saw the appellant struggling and screaming. She saw no hitting by appellant or by the police officers (R 265). Two (2) other witnesses testified to appellant's peaceful character (R 259, 270-271).

Appellant testified on his own behalf. He did acknowledge that he did push the officers gun back when the officer drew it (R 504). He then stated the officer punched him but that he never fought the officer. He testified he never got a chance to strike or fight. (R 502-504). He exclaimed he never hit a police officer, nor kicked a police officer, nor did he ever grab any officer on any part of an officer's body (R 508-510). Appellant exclaimed . . . "I don't resist no arrest. I respect the law." (R 510). Appellant maintained that he never had a chance to resist at all, that he did not get a chance to do anything (R 520).

Appellant was found guilty as charged in count I of fleeing or attempting to elude a police officer, guilty as charged of count II for committing battery on a law enforcement officer and guilty as charged in count III for resisting arrest with violence (R 397, 476-478).

Prior to submitting the issues to the jury, the defense counsel below requested the following jury instruction:

> It is lawful to defend oneself against unlawful or excessive force even when being arrested.

This request was predicated upon section 776.012, Florida Statutes (1983), and the case of Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981), (R 466). The trial court denied this requested instruction (R 326). The trial court did give the instructions pursuant to the Standard Jury Instructions as quoted in the opinion (A 2). The opinion, after citing the Standard Jury Instructions,

held:

> As pointed out in the recent case of Allen v. State, 424 So.2d 101 (Fla. 1st DCA), review denied 436 So.2d 97 Fla. (1983), this standard jury instruction is wrong because it tells a jury that force by an arrestee may never be used, even to rebut excessive force, if he knows, or reasonably should know, that his assailant is a law enforcement officer. This is not the law, and never has been.

The opinion, later on, holds that the jury instruction requested by appellant is a correct statement of law. That instruction set out in the opinion is as follows:

> It is lawful to defend oneself against unlawful or excessive force, even when being arrested.

(A 4). The opinion went on to hold that the standard jury instructions given by the court (Florida Standard Jury Instruction 3.04(b) (Criminal) was error and that the issue was removed from the jury's province. The court reversed the convictions for resisting arrest with violence and battery on a law enforcement officer and remanded for a new trial (Appendix 4).

POINT I

THERE IS DIRECT AND EXPRESSED CONFLICT BETWEEN THE CASE AT BAR, JACKSON V. STATE, 10 F.L.W. 223 (Fla. 5th DCA, Jan. 17, 1985) AND THE CASES OF LOWERY V. STATE, 356 So.2d 1325 (Fla. 4th DCA 1978), IN THE MATTER OF THE USE BY THE TRIAL COURTS OF THE STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, 431 So.2d 594 (Fla. 1981), AND GRIFFIN V. STATE, 370 So.2d 860 (Fla. 1st DCA 1979).

In Lowery v. State, 356 So.2d 1325 (Fla. 4th DCA 1978), it was held that one could not use violence to resist even an unlawful arrest. Id. at 1326. In Jackson v. State, 10 F.L.W. 223 (Fla. 5th DCA, Jan. 17, 1985), the Fifth District promulgated the following jury instruction and held that it was applicable to the case:

> It is lawful to defend oneself against unlawful or excessive force, even when being arrested.

(Emphasis supplied). (R 466, Appendix 4). Petitioner submits that these cases conflict especially because the resulting jury instruction would add confusion. Under Jackson the jury would be told that a defendant could use physical means when the arrest was by means of "unlawful" force. Yet under Lowery, the jury would be instructed that a defendant could not use any type of physical force or violence to resist an unlawful arrest. Id. at 1326. See, section 776.051(1), Florida Statutes (1983), and Florida Standard Jury Instructions (Criminal). Petitioner submits that a jury would not be able to discern that there is a distinction between an illegal arrest (in which some force, however slight, would have to be used to effectuate the arrest) and when a defendant could physically defend himself against "unlawful" force. Petitioner submits the jury instruction as promulgated by the Fifth District in Jackson should be modified to conform with Lowery as follows:

> It is lawful to defend oneself against

> unnecessary or excessive force, even when being arrested.

In Jackson the Fifth District held that Florida Standard Jury Instruction (Criminal) 3.04(b), which states in the pertinent part:

> A person is never justified in the use of any force to resist an arrest. Therefore you cannot acquit the defendant on the grounds of self-defense if you find the following facts have been proven:

that this instruction was incorrect, was not the law, and has never been the law. (Appendix 2). Yet the court in Jackson relied upon Allen v. State, 424 So.2d 101 (Fla. 1st DCA 1983). In Allen the First District held that this jury instruction was "not a totally correct statement of Florida law." (emphasis supplied). Id. at 101. The First District went on to explain that the error in the Allen case was harmless because the record was devoid of evidence from which a jury could conclude that excessive force was being used. But in the Jackson case, petitioner submits that the latter quoted standard jury instruction is a correct statement of the law if under the particular facts of the case, there was no self defense issue presented whatsoever. Inasmuch as the Allen case has qualified its holding, petitioner submits that this honorable court should likewise qualify the holding in the same manner. Although the standard jury instruction should be altered possibly in certain cases to conform to the particular facts presented to the jury, petitioner submits that the latter quoted standard jury instruction should not be totally nullified.

Petitioner submits that there is conflict with the case of Griffin v. State, 377 So.2d 860 (Fla. 1st DCA 1979), and the Jackson decision. In Griffin, it was held that the trial court could not give a jury charge absent an appropriate factual basis in the record. In Griffin the jury was given an instruction regarding a presumption of possession of recently stolen property but there was no evidence whatsoever that the defendant was ever in possession

of such property. In Jackson, the respondent never offered any evidence that he was defending himself at all. The state's testimony was to the effect that the police officer approached respondent with a gun because he had seen appellant make a movement underneath his seat, and at that time, the appellant grabbed the gun. The policeman then holstered his gun and then another policeman came up to the scene to assist his fellow officer in removing respondent from his automobile. At this point, the police officer testified that the respondent grabbed the testicles of one of the officers and a fight ensued. (R 137-141). But by respondent's own testimony, he never fought back. He testified he never had a chance to strike or fight back. He specifically stated he did not grab the testicles of any officer (R 502-504, 508-510, 520). Appellant's testimony was to the effect that, "I don't resist no arrest. I respect the law." (R 510). Additionally, no witness for respondent testified that they saw the respondent fighting the police officers (R 233, 243, 265). Inasmuch as respondent has not offered any evidence of using force in a self-defense manner, pursuant to section 776.012, petitioner submits that the Florida Standard Jury Instructions read, along with the self-defense instructions, pursuant to section 776.012, would either be correct or at worst harmless error.

Based upon the disparate holdings between Jackson, supra, Lowrey, supra, In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981), and Griffin, supra, petitioner would submit that there is direct and expressed conflict and the jury instructions should be reviewed to encompass differing factual situations.

CONCLUSION

Based on the argument and authority cited herein, petitioner respectfully prays this honorable court exercise its disrectionary jurisdiction in this cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on Jurisdiction has been furnished to Jim Wulchak, Assistant Public Defender for respondent, by mail, at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014 this 12th day of March, 1985.

Of Counsel
W. BRIAN BAYLY